

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 9, 2021

CLAIM NO. 201785772

T-RAD NORTH AMERICA

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

SHANNON BROWN AND
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. T-Rad North America (“T-Rad”) appeals from the October 5, 2020 Opinion, Award, and Order rendered by Hon. Grant S. Roark, Administrative Law Judge (“ALJ”), awarding Shannon Brown (“Brown”) permanent total disability (“PTD”) benefits, and medical benefits for a work-related injury she sustained on March 2, 2017. T-Rad also appeals from the November 9, 2020 Order on its Petition for Reconsideration, and the December 7, 2020 Order on Brown’s Petition for

Reconsideration awarding temporary total disability (“TTD”) benefits, and permanent partial disability (“PPD”) benefits for the time period prior to her entitlement to the award of PTD benefits.

T-Rad argues the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) does not support the ALJ’s determination Brown has compensable Complex Regional Pain Syndrome (“CRPS”), and his reliance upon the diagnosis and impairment rating assessed by Dr. Jules Barefoot is therefore not in accordance with KRS 342.730. T-Rad also argues the ALJ erred in relying upon Dr. Barefoot’s opinions in finding Brown is permanently totally disabled. Finally, T-Rad argues the ALJ erred by awarding both PTD and PPD benefits for the same injury. We affirm.

The record supports the ALJ’s determination of Brown’s compensable CRPS. The ALJ accurately explained he was required to rely upon the AMA Guides for determining permanent impairment, but not causation. This determination is supported by the holding in Tokico v. Kelly, 281 S.W.3d 771 (Ky. 2009). We also determine the ALJ did not err in finding Brown is permanently totally disabled. We additionally determine the ALJ did not err in awarding PPD benefits from the date of injury to September 27, 2019, interrupted by periods of TTD benefits based upon the 39% impairment rating Dr. Barefoot assessed, with the applicable factor and application of the three-multiplier contained in KRS 342.730(1)(c)1, and PTD benefits afterward. This determination is supported by the holding in Dolt & Dew, Inc. v. Smith, 493 S.W.2d 711 (Ky. 1973).

Brown, a resident of Cadiz, Kentucky, filed a Form 101 on May 15, 2019 alleging she sustained multiple upper extremity injuries when she was trapped in a machine on March 2, 2017 while working for T-Rad in Hopkinsville, Kentucky. In her Form 104, Brown provided a history of performing numerous jobs both prior to and after her work injury. She has worked for an optical company in inventory control, as a machine operator, an installation technician, a census worker, a restaurant manager, and in payroll preparation.

Brown testified by deposition on October 8, 2019, and at the hearing held August 4, 2020. She is a high school graduate, completed one year of college, and has no specialized or vocational training. Brown was born on March 1, 1973. Brown sustained work injuries on March 2, 2017 while working as a leak tester on a production line for T-Rad. Her job required connecting and disconnecting lines to the tested equipment.

On the date of the accident, the safety doors to the tester were removed and the indicator light notifying her to remove her hands was inoperative. As a result, Brown was not notified to remove her hands from the tester, and they became trapped for over twenty minutes. After she was freed from the machine, her supervisor drove her to the emergency room for treatment. No bones were broken, but she had significant swelling of her arms. She eventually treated with Dr. Frederick Robbe, who performed releases of her right thumb and index finger.

Brown subsequently returned to light duty work, but the parties stipulated she never returned to the same or greater wages. She also testified she never fully recovered from her injuries, and her conditions have continued to worsen.

T-Rad terminated her employment when she could not return to her regular work. She worked at a factory through a temporary service agency for a week, but was terminated when her hands began swelling after removing stickers. She later worked at Peak Optical verifying the scanning of eyeglasses into the computer system for inventory control. She was eventually terminated from that position due to excessive absenteeism caused by problems stemming from her work injuries including arm swelling. In addition to arm swelling, she also complains of swelling in her legs, ankles, and abdomen. She also testified her skin is very sensitive to the touch of water or air, and she requires assistance with activities of daily living.

Brown filed Dr. Barefoot's April 9, 2019 report in support of her claim. He noted the March 2, 2017 crush injury to her right upper extremity after she was trapped in a machine for over twenty minutes. He observed she has markedly diminished right hand grip strength. He also noted some left hand grip strength, not as significant as the right. She reported difficulty with activities of daily living and sleeping due to chronic pain. Dr. Barefoot diagnosed her with a right arm/hand crushing injury, right thumb/index traumatic trigger finger, CRPS, and status-post right thumb and index finger releases. He attributed all of the diagnoses to the work injury. He additionally noted Brown had reached maximum medical improvement ("MMI"). Dr. Barefoot assessed a 39% impairment rating pursuant to the AMA Guides. He opined she needs psychiatric/psychological follow-up. He also stated Brown is only able to perform negligible lifting, grasping, or carrying with the right upper extremity. He stated she is unable to work on ladders, scaffolding, or heights, and she is unable to repetitively manipulate objects. He did not believe Brown is

able to return to any work. He specifically disagreed with Dr. Thomas Gabriel's opinions. He also stated she needs a spinal cord stimulator.

Dr. Barefoot testified by deposition on November 22, 2019. He evaluated Brown on April 9, 2019, and diagnosed her with traumatic right thumb/index trigger finger, and CRPS caused by the March 2017 work injury. He explained CRPS is the same thing as reflex sympathetic dystrophy ("RSD"). He noted Brown had skin color changes, edema, and swelling when he saw her, but her hair growth was normal. She reported difficulty with self-care activities. He noted she had significant loss of right grip strength on dynamometer testing. He also noted she can engage in only minimal, negligible lifting or carrying. He advised she should not engage in climbing ladders, nor work on scaffolding or at heights. He also advised her to avoid repetitive pushing or pulling, or equipment operation with her right upper extremity.

Dr. Barefoot explained neurological dysfunction like CRPS can travel to parts of the body other than the injured area. He stated there is no way to predict which body parts can be affected by CRPS. He noted stellate ganglion blocks were unsuccessful. Dr. Barefoot agreed Brown did not meet the specific criteria for the diagnosis of CRPS set forth in the AMA Guides, but he provided an explanation as to why he believed the diagnosis is appropriate. He specifically noted those guidelines are outdated since they were developed more than twenty years ago. He also explained the impairment ratings for RSD and causalgia are located in different sections of the AMA Guides than the ratings for CRPS.

Brown filed records from Comprehensive Pain Specialists for treatment she received on seven occasions between November 29, 2017 and February 8, 2018. The records reflect a history of the March 2017 work accident, surgeries, and chronic pain. On January 3, 2018, Brown reported bilateral pain complaints due to CRPS stemming from the March 2017 accident. Stellate ganglion blocks provided only minimal relief. On February 8, 2018, Brown was diagnosed with chronic pain, CRPS of both upper arms, anxiety, and longstanding use of opiates.

Brown also filed records from the Jennie Stuart Medical Center for treatment she received on twelve occasions from April 20, 2017 to March 28, 2018. Those records include the operative note for the right thumb and index finger pulley releases performed by Dr. Robbe. Brown continued to complain of right hand, elbow, and arm pain. She was subsequently diagnosed with CRPS. The records reflect she continued to complain of stiffness, swelling, and joint pain. She also developed color changes, weakness, and burning. She eventually developed symptoms in her left upper extremity. The March 28, 2018 note reflects Brown had problems with right hand pain, diabetes mellitus, vitamin D deficiency, COPD, and mottled appearances of both the right and left upper extremities.

Brown also filed the Vanderbilt University Medical Center records for treatment from December 2, 2019 to February 5, 2020. The records reflect Brown complained of pain in both arms and legs. She was diagnosed with causalgia/CRPS of the bilateral upper limbs, upper abdominal pain, and splenomegaly.

Brown additionally filed the records from PMCA-Madisonville. On March 18, 2020, she was treated for complaints of bilateral upper extremity and abdominal pain. She was diagnosed with bilateral upper extremity and abdominal pain, splenomegaly, CRPS (bilateral upper extremities), and the long-term use of opiates. She returned on April 27, 2020 with the same complaints.

Dr. Gabriel evaluated Brown at T-Rad's request on June 27, 2018. He noted Brown sustained right arm and hand crush injuries on March 2, 2017 while working at T-Rad. He previously evaluated her on February 14, 2018. He diagnosed her with chronic right arm pain, and probable somatoform disorder/somatoform conversion disorder. Dr. Gabriel did not believe she met the criteria for diagnosing CRPS. He assessed an 11% impairment rating pursuant to the AMA Guides. He recommended she avoid pushing or pulling greater than ten pounds with her right upper extremity. He stated she needs no additional musculoskeletal treatment. He found she had reached MMI, and determined she may benefit from a psychiatric evaluation. In his report dated February 14, 2018, Dr. Gabriel diagnosed Brown with chronic pain. He found she does not have CRPS, and needs pain management. He felt she would reach MMI within two to three months.

Dr. Gabriel testified by deposition on January 13, 2020. He evaluated Brown on February 14, 2018 and June 27, 2018. He found she had reached MMI by June 27, 2018. Brown complained of chronic pain in the right and left upper extremities. He noted she was holding and guarding her right arm. She complained of right shoulder and elbow stiffness, and her left arm was painful with full range of motion. Dr. Gabriel did not see any evidence of the manifestation of RSD. He

assessed an 11% impairment pursuant to the AMA Guides. He found no clinical evidence linking the left upper extremity complaints to the right upper extremity injury. He found no basis for ongoing right upper extremity treatment. He stated the Jennie Stuart Medical Records created no suspicion for a diagnosis of RSD. Dr. Gabriel stated he did not disbelieve Brown's complaints of pain. He opined Brown does not have CRPS or RSD.

T-Rad filed multiple pages of medical records from Jennie Stuart Medical Center for treatment Brown received on six occasions between October 3, 2016 and September 26, 2019. Brown had a chest X-ray on October 3, 2016, unrelated to her current complaints. The treatment records from September 15, 2019 to September 26, 2019 indicate complaints of abdominal pain, right lower rib pain, right lower chest pain, leg and foot pain, and associated nausea and vomiting.

T-Rad additionally filed records from Pennyroyal Mental Health for thirteen visits from April 2, 2007 through April 7, 2017. The records reflect she was seen for AD/HD, depression, anxiety, panic disorder, agoraphobia, bipolar disorder, and personality disorder NOS. She was treated for those conditions with various medications. A subsequent filing of treatment records from September 10, 2018 and April 11, 2019 reflect Brown had refills of Wellbutrin, Ambien, Xanax, and Celexa.

T-Rad filed treatment records from the Vanderbilt University Medical Center for a September 12, 2019 visit. The records reflect she was seen for follow-up of her CRPS. She was noted to be hostile and disruptive. The records reflect a history of anxiety, high blood pressure, and chronic pain. Brown complained of right rib pain, left chest pain, abdominal swelling, and nausea.

A Benefit Review Conference was not held. At the hearing, the parties stipulated to the occurrence of the March 2, 2017 work injury. TTD benefits were paid from April 21, 2017 to July 17, 2017, and again from February 1, 2018 to May 9, 2018, at the rate of \$566.00 per week. Brown's average weekly wage was \$848.96. Medical expenses were paid in the amount of \$22,695.35. The parties agreed Brown never returned to work at the same or higher rate of pay. The issues preserved for determination included benefits per KRS 342.730, multipliers, unpaid medical bills, entitlement to permanent total disability benefits, and TTD as to duration.

The ALJ rendered his Opinion, Order & Award on October 5, 2020, finding Brown sustained compensable bilateral CRPS due to her March 2, 2017 work injury. The ALJ determined the AMA Guides do not control regarding rendering a diagnosis, but are solely utilized in determining the appropriate impairment rating. The ALJ explained why he found Dr. Barefoot's diagnosis credible. The ALJ specifically found, "Ultimately, the ALJ finds the opinions from the treating physicians more persuasive than the one, contrary opinion from the defendant's expert, Dr. Gabriel. It is therefore determined plaintiff has bilateral CRPS causally related to the work injury as opined by Dr. Barefoot." The ALJ also relied upon the 39% impairment rating Dr. Barefoot assessed pursuant to the AMA Guides. The ALJ outlined why he relied upon Dr. Barefoot's impairment rating, and why he deemed it most appropriate. Based upon the restrictions of record, and relying upon the factors set forth in Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015), the ALJ determined Brown is permanently totally disabled.

T-Rad filed a Petition for Reconsideration arguing the ALJ erred in finding Brown permanently totally disabled, and in particular that she was so disabled beginning March 2, 2017 because she had returned to work on multiple occasions after that date. T-Rad also argues the ALJ erred in finding the impairment rating assessed by Dr. Barefoot is in accordance with the AMA Guides. T-Rad additionally requested the ALJ to make findings of fact “without engaging in improper burden shifting.” Finally, T-Rad argued the ALJ erred in relying upon Dr. Barefoot in support of finding Brown is entitled to an award of PTD benefits.

The ALJ entered an Order on November 9, 2020 regarding T-Rad’s Petition for Reconsideration. The ALJ changed the start date for Brown’s award of PTD benefits to September 27, 2019. The ALJ declined to change his decision regarding his reliance upon Dr. Barefoot’s opinions. The ALJ determined the burden of proof was not improperly shifted to T-Rad. The ALJ also declined T-Rad’s request to change the finding that Brown is entitled to PTD benefits.

Brown filed a Petition for Reconsideration on November 18, 2020, arguing the ALJ found she is entitled to TTD benefits commencing September 27, 2019, but failed to address entitlement to any benefits prior to that date despite finding she sustained a work injury on March 2, 2017. Brown requested she be awarded PPD benefits based upon the 39% impairment rating multiplied by the grid factor of 1.70, with application of the three-multiplier pursuant to KRS 342.730(1)(c)1, capped at \$560.31 per week, for the periods of March 2, 2017 to April 20, 2017, July 18, 2017 to January 31, 2018, and May 10, 2018 to September 26, 2019.

The ALJ issued an Order on the Petition for Reconsideration on December 7, 2020. The ALJ found Brown was entitled to PPD benefits based upon the 39% impairment rating assessed by Dr. Barefoot, with application of the appropriate factor, and the three-multiplier contained in KRS 342.730(1)(c)1 from March 2, 2017 to September 26, 2019. The ALJ determined the award of PPD benefits was suspended by any periods of TTD benefits paid, with 12% interest on any past due amounts up to June 29, 2017, and 6% thereafter until paid.

We initially note that, as the claimant in a workers' compensation proceeding, Brown had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Brown was successful in her burden, we must determine whether substantial evidence of record supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

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 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).

We find no merit in T-Rad's argument the ALJ erred in relying upon Dr. Barefoot's determination Brown has CRPS. It argues the AMA Guides set forth the criteria necessary for diagnosing CRPS. The Supreme Court in Tokico v. Kelly, supra, held KRS 342 does not require a doctor to conform his diagnosis to criteria listed in the AMA Guides. The Supreme Court stated:

KRS 342.730(1)(b) bases partial disability benefits on a permanent impairment rating, which KRS 342.0011(35) defines as being the "percentage of whole-body impairment" that an injury causes "as determined by" the latest edition of the *Guides*. Neither statute refers to a physician's diagnosis. Chapter 1 of the Fifth Edition discusses the *Guides'* philosophy, purpose, and appropriate use. Page 11 acknowledges that "some medical syndromes are poorly understood," that physicians must use clinical judgment when assigning impairment ratings, and that "clinical judgment, combining both the 'art' and 'science' of medicine,

constitutes the essence of medical practice.” Diagnosing what causes impairment and assigning an impairment rating are different matters. Diagnostic criteria stated in the *Guides* clearly have relevance when judging the credibility of a diagnosis, but Chapter 342 does not require a diagnosis to conform to criteria listed in the *Guides*.

Id. at 774-775.

Dr. Barefoot offered a reasonable explanation for the basis of his ultimate conclusion, not the least of which the fact that the criteria contained in the AMA Guides for diagnosing CRPS is more than twenty years old, and there have been changes since its publication. We believe the ALJ could reasonably determine Dr. Barefoot’s opinion regarding the presence of compensable CRPS constitutes substantial evidence upon which he was free to rely. Likewise, we find the ALJ did not err in relying upon the impairment rating Dr. Barefoot assessed.

We also determine the ALJ did not err in finding Brown is permanently totally disabled. Nor do we believe the ALJ erred in awarding PPD benefits from the date of injury until September 27, 2019, interrupted by periods to which she was entitled to TTD benefits. To rule otherwise would deprive Brown of any benefits prior to September 27, 2019 despite her physical difficulties stemming from her injury and surgeries. Brown testified she has been unable to return to the type of work activities she engaged in prior to her work injury.

Despite multiple attempts to work after the injury, as stipulated by the parties, Brown was never able to return to work at the same or greater wages. Brown testified the jobs she performed after the date of the injury, for all employers, were lighter duty than what she was doing at the time of the accident. There is no

evidence of record establishing she ever retained the ability to return to her pre-injury work. The ALJ performed the appropriate analysis pursuant to the direction provided in City of Ashland v. Stumbo, supra, in determining she is permanently totally disabled.

We likewise find the ALJ did not err in determining Brown is entitled to PPD benefits from the date of injury until September 27, 2019. This is similar to the situation in Dolt & Dew, Inc. v. Smith, 493 S.W.2d 711 (Ky. 1973). Smith was injured while working for Dolt & Dew, Inc. He returned to light duty work afterward, and continued in that employment until the company went out of business. Smith was awarded PPD benefits for the period he returned to work, and PTD benefits afterward. The Kentucky Court of Appeals, predecessor of the Kentucky Supreme Court, noted:

In summary, we conclude that the Board was justified in determining that Smith's disability, the effects of which were not fully realized, permanent and partial so long as he was afforded work by his employer that he was able to do, proved to be total and permanent when his employer went out of business ...

Id. at 713.

In this instance, Brown made multiple attempts to return to work after her injury, but was physically unable to do so. As in Smith, Brown's disability was not "fully realized" until she was unable to perform her last job. Based upon this reasoning, we find the ALJ did not err in awarding PPD benefits, TTD benefits, and PTD benefits, and we affirm.

Accordingly, the Opinion, Order & Award rendered October 5, 2020, and the November 9, 2020 and December 7, 2020 Orders on the Petitions for

Reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are
AFFIRMED.

ALL CONCUR.

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