

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 30, 2021

CLAIM NO. 201864539

TARA CARTER

PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE**

TOYOTA MOTOR MANUFACTURING
OF KENTUCKY and
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Tara Carter (“Carter”) appeals from the December 14, 2020 Opinion and Award and the January 7, 2021 Order overruling her Petition for Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits and medical

benefits pursuant to KRS 342.020, but dismissed Carter's claim for permanent partial disability ("PPD") benefits.

On appeal, Carter argues the ALJ failed to summarize the conflicting evidence. She also argues the impairment rating assessed by Dr. William O'Neill constitutes substantial evidence upon which an award could be based. We determine the ALJ appropriately summarized the evidence of record. Because substantial evidence supports the ALJ's determination, and a contrary result is not compelled, we affirm.

Carter filed a Form 101 on May 8, 2020. She alleged a right elbow injury occurred on May 18, 2018 in the course of her job of building a vehicle at Toyota Motor Manufacturing of Kentucky ("Toyota") in Georgetown, Kentucky. She stated she experienced a pop in her right elbow as she was pushing/pulling on an outer belt molding. She indicated she had hand therapy, steroid injections, and a right elbow fasciotomy due to her injury.

Carter testified by deposition on August 25, 2020, and at the hearing held October 27, 2020. Carter is a resident of Georgetown, Kentucky, and was born on November 11, 1973. She is a high school graduate, and completed some college courses. Carter began working for Toyota in 2012. She testified she previously injured her left elbow in 2016 from which she continues to experience some problems, but she did not file a claim for that condition.

On May 18, 2018, Carter was working on an outer belt mold job. She attempted to repair a tuck in the belt when she experienced a pop in her right elbow. She initially treated for the condition with the line nurse, and was then referred to

HHS. She eventually treated with Dr. O'Neill at Bluegrass Orthopaedics who had previously treated her left elbow. Dr. O'Neill administered elbow injections, and ordered physical therapy. She eventually returned to work, but suffered a re-injury. Dr. O'Neill performed right elbow surgery in June 2019, which she described as a debridement, tendon repair, and repositioning of the ulnar nerve. She noted the surgery initially provided temporary relief, but that did not last. She testified she returned to work multiple times after May 18, 2018, and received TTD benefits for all periods she missed from work until she ran out of restricted days on September 9, 2020. She received her usual pay when she returned to limited duty.

In support of her claim, Carter filed a two-page document that appears to be an application for some disability benefit with Minnesota Life Insurance Company. Dr. Maria M. Reyes completed the second page of that document. Dr. Reyes noted the injury occurred on May 30, 2018¹. She noted Carter has right lateral epicondylitis. The document also notes Carter's previous history of problems with left lateral epicondylitis.

Carter also filed Dr. O'Neill's response to a questionnaire dated June 4, 2020. He noted Carter had reached maximum medical improvement ("MMI"). He noted she has a 6% impairment rating based upon a functional capacity evaluation ("FCE"), but he did not indicate whether it was assessed in accordance with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He also recommended restrictions of

¹ The Form 101 reflects the injury occurred on May 18, 2018, despite the inconsistent references in the medical documentation. The ALJ found the injury occurred on May 18, 2018, and the date of injury was not disputed on appeal.

avoidance of gripping in excess of five pounds occasionally, or pinching more than two pounds occasionally.

Carter also filed the April 18, 2020 report from Bluegrass Orthopaedics Physical Therapy dated May 18, 2020, prepared by Robert Pruden, P.T. Mr. Pruden noted Carter passed only 14 of 23 validity criteria for which her evaluation yielded borderline results. Based upon the loss of grip strength measurements, he indicated Carter has a 6% impairment rating pursuant to the AMA Guides. The report also indicates she can work at a light-medium physical demand level up to eight hours per day. Toyota also filed the summary of the FCE report.

Toyota submitted reports from Dr. Ronald Burgess dated March 14, 2019 and July 1, 2020. In his first report, Dr. Burgess noted the injury occurred on May 30, 2018 when she was working on a vehicle on the assembly line at Toyota. She reported right elbow pain, and eventually treated with Dr. O'Neill for right epicondylitis, and her previous left medial epicondylitis. At the time of the first evaluation, Carter had full range of motion of the right elbow. He found her right lateral epicondylitis had resolved, and she had a 0% impairment rating based upon the AMA Guides.

On July 1, 2020, Dr. Burgess noted Dr. O'Neill performed surgery consisting of debridement of the right extensor carpi radialis brevis on June 11, 2019. He reviewed the May 18, 2020 FCE report. He noted nerve conduction studies were normal. He specifically noted inconsistencies on grip strength testing. Dr. Burgess stated Carter had reached MMI from the debridement, and assessed a 0% impairment rating based upon the AMA Guides. He noted Carter experienced a

work-related event, but epicondylitis is part of the aging process. He also noted Carter does not have the physical capacity to return to the type of work performed on the date of the injury.

A Benefit Review Conference was held on October 7, 2020. The parties stipulated to a May 18, 2018 date of injury. The parties also agreed TTD benefits had been paid for various periods at \$666.54 per week for a total of \$40,468.50. Toyota also paid \$17,660.67 on Carter's behalf for medical treatment. The parties identified the following contested issues: benefits per KRS 342.730, TTD (rate and duration), credit for TTD and wages, and whether impairment ratings were assessed in accordance with the AMA Guides.

The ALJ rendered an Opinion and Award on December 14, 2020 dismissing Carter' claim for PPD benefits. Regarding the requirement that awards of PPD benefits must be based upon impairment ratings assessed pursuant to the AMA Guides, the ALJ noted *verbatim* as follows:

This includes the plaintiff's burden to show that because of her work related injury, she has been left with an impairment rating under the AMA guides. In Jones v. Brash-Barry General Contractors, 189 S.W. 3d 149 (Ky. App. 2006), the Kentucky Court of Appeals found that it was error for an ALJ to rely on an impairment assessed by a physician who noted in his testimony that the impairment was outside the expressed terms of the AMA guides. In Plumey v. Kroger, 557 S. W. 3d 905 (Ky. 2018), the Kentucky Supreme Court clarified a medical opinion must simply be grounded in the AMA guides, which does not require strict adherence, but rather a general conformity. However, an ALJ cannot choose to give credence to an opinion of a physician that is not based on the AMA guides. Therefore, it is clear that in order to award income benefits the plaintiff must establish an assessment of impairment rating appropriately under the AMA guides, fifth edition.

Although the ALJ found Dr. O'Neill could rely upon a functional capacity report in assessing impairment, he stated, "However, I agree with the defendant that the opinion of Dr. O'Neill in this instance does not constitute substantial evidence upon which an award of benefits can be based." The ALJ explained that determination was based upon the demonstrated lack of grip strength on testing, and his finding that Dr. Burgess' opinions were more credible. He additionally stated as follows, *verbatim*:

Given the fact that the functional capacity evaluation itself indicates the handgrip consistency is invalid, I feel I have little choice but to find that the plaintiff has failed to show a permanent impairment rating under the AMA guides. The AMA guides themselves indicate that impairment cannot be assessed based upon grip strength when there is a lack of maximum effort. While the plaintiff may have some residual impairment following her injury and surgery, an award of income benefits can simply not be based upon an impairment rating obtained in a manner prohibited by the AMA guides. The ALJ feels that he has no choice but to dismiss the plaintiff's claim for permanent income benefits at this time.

The ALJ found Carter is entitled to TTD benefits that were previously paid, and medical benefits pursuant to KRS 342.020, finding as follows:

1. For the foregoing reasons, the plaintiff's claim for income benefits, beyond the TTD benefits voluntarily paid, is hereby dismissed.
2. The plaintiff shall recover medical expenses from the defendant, including but not limited to provider's fees, hospital treatment, surgical care, nursing, supplies, appliances, prescriptions, and mileage reimbursements as may be reasonably required for the cure and relief from the effects of the right elbow injury under KRS 342.020. The defendant's obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.

Carter filed a Petition for Reconsideration arguing the ALJ failed to consider the valid portions of the FCE results. She noted the ALJ did not summarize the testing that yielded valid results. The ALJ denied Carter's Petition in an Order dated January 7, 2021. The ALJ specifically found as follows:

This matter is before the ALJ on the plaintiff's petition for reconsideration. The plaintiff argues the ALJ did not adequately consider the entirety of the evidence presented regarding the plaintiff's alleged impairment under the AMA guides. The plaintiff essentially argues the assessment of impairment by Dr. O'Neill is substantial evidence that should have been relied upon by the ALJ. The ALJ notes that on page 4 of the decision, he stated that he considered the entirety of the evidence contained in the record. This includes the results of the FCE and the opinion of Dr. O'Neill. After reviewing the entirety of the evidence, the ALJ found the opinion of Dr. Burgess to be more persuasive than that of Dr. O'Neill because Dr. Burgess pointed to the poor efforts of the plaintiff on his examination and the documented poor effort on grip strength testing in the FCE. Dr. Burgess noted and the AMA guides reveal that loss of grip strength should not be utilized for assessment of impairment when there is evidence of poor effort. On the other hand, Dr. O'Neill's assessment of impairment simply relies upon the impairment rating documented in the FCE. It is unclear whether Dr. O'Neill considered whether the plaintiff provided a valid effort on grip strength testing during the FCE. Therefore, even when one considers the opinion of Dr. O'Neill may be substantial evidence, it is not persuasive evidence in regards to the assessment of impairment under the AMA guides. Therefore, the petition for reconsideration is denied.

On appeal, Carter argues the ALJ failed to adequately summarize the conflicting evidence. She also argues Dr. O'Neill's impairment rating constitutes substantial evidence upon which an award can be based.

As the claimant in a workers' compensation proceeding, Carter 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 Carter was unsuccessful in proving her claim for PPD, 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 they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, *supra*.

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 which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As 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, supra.

Substantial evidence supports the ALJ's determination Carter is not entitled to PPD benefits. Thus, a contrary result is not compelled. The ALJ appropriately noted Carter was required to establish she has an impairment rating based upon the AMA Guides, as required by the holding Jones v. Brash-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). There, the Kentucky Court of Appeals determined an ALJ erred in relying on an impairment assessed by a physician who admitted the impairment rating he assessed was not in accordance with the AMA Guides. In Plumley v. Kroger, 557 S.W.3d 905 (Ky. 2018), the Kentucky Supreme Court stated a medical opinion must be grounded, but is not necessarily required to strictly adhere to the AMA Guides. However, the Court noted an ALJ may not give credence to a medical opinion that is not based on the AMA Guides. In this instance, the ALJ provided a basis for his determination, and found Dr. O'Neill's determination regarding the impairment rating falls outside the necessary requirements for such an assessment in accordance with the AMA Guides.

We find no merit in Carter’s argument that the ALJ failed to properly consider the evidence. To the contrary, the ALJ clearly explained the basis for his determination, and why he found Dr. Burgess’ opinions the most credible. Essentially, Carter requests this Board to substitute its judgment for that of the ALJ, which we cannot do. We find the ALJ’s determination is supported by substantial evidence, and a contrary result is not compelled, therefore his decision will not be disturbed.

Accordingly, the December 14, 2020 Opinion and Award and the January 7, 2021 Order rendered by Hon. John B. Coleman, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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