

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 10, 2020

CLAIM NO. 201900212

THE HERITAGE NURSING HOME

PETITIONER

VS. APPEAL FROM HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

SHIRLEY MILLS and  
HON. JANE RICE WILLIAMS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and RECHTER<sup>1</sup>, Members.

**ALVEY, Chairman.** The Heritage Nursing Home (“Heritage”) appeals from the September 25, 2019 Opinion, Award, and Order rendered by Hon. Jane Rice Williams (“ALJ”). The ALJ found Shirley Mills (“Mills”) sustained a compensable

---

<sup>1</sup> Although Board Member Rechter’s term expired on January 4, 2020, she is permitted to serve until January 22, 2020 pursuant to KRS 342.213(7)(b), and will participate in decisions rendered by this Board through that date.

low back injury on August 1, 2018. The ALJ awarded permanent partial disability (“PPD”) benefits and medical benefits. No petition for reconsideration was filed.

On appeal, Heritage argues a portion of the ALJ’s decision is erroneous and requires reversal. It argues the ALJ erred by relying on Dr. John W. Gilbert’s assessment of impairment regarding Mills’ gait and station, which it asserts is not supported by the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). It argues the ALJ’s reliance upon Dr. Gilbert’s assessment of gait and station is not supported by substantial evidence, and a contrary result is compelled. We disagree and affirm.

Mills filed a Form 101 on February 25, 2019 alleging she sustained a lumbar or sacral vertebrae injury due to pushing and pulling at work on August 1, 2018. At the time of the accident, Mills was working as a CNA at Heritage in Corbin, Kentucky. She began working for Heritage in 2011. Mills has previously worked as a CNA for other nursing facilities and as a cashier at Wal-Mart.

Mills testified by deposition on June 14, 2019, and at the hearing held August 7, 2019. Mills was born on January 5, 1968, and is a resident of Corbin, Kentucky. She is a high school graduate, and obtained her CNA certification in 2002 while working for a nursing home in Barbourville, Kentucky. Prior to her accident, Mills’ job as a CNA involved direct patient care including bathing, dressing, transferring to wheel chairs, giving showers, and transporting residents to activities. The job required lifting, pulling, and extensive walking. On light duty, she does no pulling, transferring, or work in excess of her restrictions. She passes snacks and ice, and takes vital signs. She also answers call lights, but has to request

assistance if the need is beyond her restrictions. She is able to stand or walk for brief periods, but must change positions or rest frequently. She also stated she is able to sit for up to thirty minutes at a time before she has to move around due to her back and leg pain. She continues to work for Heritage as a CNA in a light duty capacity. She attempted to return to regular duty for six weeks, but was unable to continue due to her back, hip, and leg symptoms. Mills testified she can lift ten pounds, but is unable to lift twenty pounds due to her limitations from the work injury.

On August 1, 2018, Mills arrived at work at 6:45 a.m. At approximately 7:00 a.m., she was assisting another CNA with pulling a resident up in bed for breakfast using a draw sheet. The draw sheet pulled from under the resident, and Mills experienced immediate pain and burning in her low back and right leg. She worked her entire shift, and at the end of the day completed an incident report. Mills showered when she got home from work and then went to bed. She awoke between 4:00 a.m. and 5:00 a.m. with intense pain. She then went to the local emergency room. X-rays were taken, and she received pain shots. Mills was advised to follow up with her family physician, Dr. Vernon Taylor.

Dr. Taylor referred Mills to Baptistworx where she was prescribed Flexeril, and an MRI was ordered. She was referred to Dr. Gilbert after the MRI results were received. Dr. Gilbert ordered physical therapy. She later received two injections in the right hip from Dr. Taylor that provided only temporary pain relief. Dr. Gilbert ordered additional injections, and advised that if those did not help, he would recommend low back surgery.

In support of her claim, Mills filed records from Grace Health. The August 15, 2018 note reflects she sustained a recent work injury. On January 2, 2019, Mills complained of low back pain with right sided radiation which onset eight months prior and continued to worsen. Dr. Natalia Doolin noted Mills had a straightening of her Lordosis revealed by x-ray, which she stated was likely due to muscle spasms. Mills described her pain as sharp, aching, shooting, and burning, aggravated by sitting and walking. On January 5, 2019, Mills described she had a catch in her back while turning over in bed. She returned to work but could not perform her work duties. She noted her physician had recommended surgery, but she wanted to put it off. On February 1, 2019, Mills complained her problem was worsening. She attributed her problems to the August 1, 2018 work injury.

Mills also filed records from Baptist Health. On August 31, 2018, Mills complained of low back pain laterally of unspecified chronicity, with unspecified sciatica present. Dr. Kevin Croce noted an MRI with contrast demonstrated a small left posterior paracentral disc protrusion at L3-L4, degenerative disc disease, facet arthropathy at L5-S1, and moderate left neuroforaminal stenosis.

Mills filed Dr. Gilbert's Form 107 medical report from an April 17, 2019 evaluation. Dr. Gilbert noted Mills' history of mid and low back pain, numbness, and weakness radiating to the legs, right worse than left with weakness and muscle spasm. Mills reported she had experienced these symptoms since the August 1, 2018 work injury when she attempted to pull a patient up in bed using a draw sheet. He noted Mills has had physical therapy, and has taken anti-inflammatories and muscle relaxers. Mills reported difficulty going up and down

stairs, primarily with the right leg, and experiences difficulty walking at times. On examination, Dr. Gilbert noted Mills has muscle spasm, tenderness, and decreased range of motion in the mid and low back. She demonstrated a positive straight leg raising in both legs, worse on the right. She also reported paresthesias at the L4 and S1 dermatomes, right worse than left. He additionally noted she has an abnormal gait.

Dr. Gilbert diagnosed Mills with a ruptured disc at L3-L4 and severe degenerative disc disease at L5-S1 with osteophyte, some spinal stenosis, back pain, and lumbar radiculopathy. He also found Mills has muscle spasm, numbness, weakness, and mid low back pain all caused by the August 1, 2018 work injury. Dr. Gilbert assessed a 25% impairment rating based upon the AMA Guides. Of this rating, he found 13% was due to Mills' lumbar injury, 9% due to gait and station, and 5% to thoracic problems. Dr. Gilbert stated Mills should observe light duty restrictions.

In addition to the Form 107, Mills filed records from Dr. Gilbert from office visits on October 15, 2018 and March 26 2019. On October 15, 2018, Dr. Gilbert noted Mills complained of low back pain radiating into her legs, right worse than left. Mills complained of an electrical burning sensation in her low back since attempting to lift a patient at work on August 1, 2018. He noted she had been on light duty, but wanted to attempt to perform regular work. He additionally noted Mills had fallen twice since her injury. He diagnosed Mills with a lumbar disc protrusion, a lumbar osteophyte, lumbar mild canal stenosis at L3-L4, aggravation of degenerative disc disease and spondylosis, lumbar strain/sprain, back pain, lumbar

radiculopathy, sciatica, limb pain, numbness, mobility issues, muscle spasm, and muscle weakness at times. He discussed surgery with Mills, but released her to attempt regular work.

On March 26, 2019, Dr. Gilbert noted Mills had attempted to perform regular duty work for six weeks, but was unable to continue. She resumed light duty work. He noted Mills has persistent tenderness, and decreased back range of motion. He noted she had a positive straight leg raising. Dr. Gilbert order physical therapy, and prescribed Flexeril.

Dr. Thomas Menke evaluated Mills at Heritage's request on June 27, 2019. He noted Mills' history of injury while attempting to lift a patient on August 1, 2018, with an immediate onset of symptoms. Mills reported she experiences increased back pain after driving or standing for long periods. She reported pain into her tailbone. Dr. Menke diagnosed Mills with a lumbar strain caused by the August 1, 2018 work incident. He noted she had mild to moderate changes on MRI. He believed Mills had reached maximum medical improvement, and assessed a 5% impairment rating based upon the AMA Guides. Dr. Menke stated no additional treatment is necessary, and she has the physical capacity to return to regular duty. Dr. Menke opined the impairment rating assessed by Dr. Gilbert is inappropriate. Dr. Menke specifically criticized the impairment rating regarding gait and station as follows:

I would state that giving an impairment rating based on station and gait is inappropriate. Ms. Mills did not show any difficulty with station and gait during my examination, even though I had her rise from a chair on multiple occasions and this chair had no arms for her to push against and she seemed to rise without significant

difficulty. This point however is irrelevant. Dr. Gilbert has used the DRE Category, which in and of itself is appropriate for Ms. Mills and the injury she sustained. When the DRE method is used for the spine, it is all inclusive. The additional use of gait and station is inappropriate. Gait and station is only used when a patient has a condition that is not otherwise well covered in the guides such as ALJ or stroke.

At the Benefit Review Conference held July 11, 2019, the parties identified the issues preserved for determination including capacity to return to the type of work performed on the date of injury, benefits per KRS 342.730, average weekly wage, unpaid/contested medical expenses, and Heritage's late filing of the Form 111.

The ALJ rendered the Opinion, Award, and Order on September 25, 2019. She determined Mills sustained a work-related low back injury on August 1, 2018. She awarded Mills PPD benefits at the rate of \$226.91 per week for 425 weeks based upon the 21% impairment rating assessed Dr. Gilbert, excluding the impairment he assessed for Mills' thoracic spine. Of this rating, 13% was for Mills' lumbar injury, and 9% for gait derangement. The ALJ did not include the 5% rating Dr. Gilbert assessed for a thoracic condition to Mills' award of PPD benefits. The ALJ found Mills does not retain the capacity to return to the type of work she performed on the date of the injury, and enhanced her award by the 3.2 multiplier contained in KRS 342.730(1)(c)1. The ALJ also awarded medical benefits related to Mills' work injury. Again, no petition for reconsideration was filed.

On appeal, Heritage argues that a portion of the ALJ's decision is clearly erroneous and requires reversal. Heritage specifically argues the ALJ erred by

relying upon Dr. Gilbert's opinion regarding Mills' gait and station. It argues the ALJ's determination, insofar as she awarded PPD benefits for gait and station impairment, is not supported by the AMA Guides and a contrary result is compelled. Heritage relies upon Dr. Menke's opinion that inclusion of an impairment rating for gait and station is inappropriate. Heritage argues the ALJ referred to Dr. Gilbert's assessment that Mills had fallen twice, but this assessment was not made in his Form 107 report. It argues that only Dr. Menke properly utilized the AMA Guides in assessing impairment, and only the impairment rating he assessed may be properly relied upon in awarding PPD benefits.

As the claimant in a workers' compensation proceeding, Mills had the burden of proving each of the essential elements of her cause of action. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was successful in his burden, the question on appeal is whether there was substantial evidence of record to support 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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 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).

We note that no petition for reconsideration was filed. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is any substantial evidence in the record supporting the ALJ's conclusion. Stated otherwise, where no petition for reconsideration was filed prior to the Board's review, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial

evidence in the record supporting the ALJ's conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Thus, our sole task on appeal is to determine whether substantial evidence supports the ALJ's decision. We conclude it does.

Contrary to Heritage's assertion, we find Dr. Gilbert's opinion, alone or in conjunction with Mills' testimony, constitutes substantial evidence supporting the ALJ's determination she sustained a compensable work-related injury. Although Heritage asserts the ALJ improperly stated Dr. Gilbert assessed Mills had fallen twice because it was not included in his Form 107 report, we note that he addressed that in his office note of October 15, 2018 office note, so he was apparently aware of her reported falling. We additionally note Dr. Gilbert's office notes, and Form 107 medical report reflect Mills' ongoing problems with her legs, and weakness. We therefore find it was not unreasonable for the ALJ to conclude the impairment assessed for gait derangement was proper. While Dr. Menke proffered a contrary opinion, this merely goes to the weight of the evidence, and a contrary result is not compelled.

We note Heritage's argument regarding the proper application of the AMA Guides. Although it specifically cites to and argues from table 13.5 from the AMA Guides, we note that Dr. Menke only stated the impairments could not be combined. Dr. Menke did not go into detail regarding the proper use of the AMA Guides, nor did he provide any specific basis for his conclusion that these impairments cannot be combined. We specifically note that Heritage's quote from the AMA Guides includes the statement, "Other anatomic or functional changes

from other body systems, such as the musculoskeletal system, are combined with the neurologic assessment for station and gait.” This does not appear to mandate the exclusion of the gait and station impairment assessed by Dr. Gilbert. We note Heritage advanced the same argument regarding the exclusion of gait and station impairment before the ALJ, which she did not find persuasive.

We acknowledge Heritage is able to point to evidence supporting its argument that Dr. Gilbert erred in assessing impairment for gait derangement, in particular Dr. Menke’s report; however, the ALJ as fact-finder determines the credibility of the evidence, including the proper use of the AMA Guides. The ALJ may choose whom and what to believe when faced with conflicting evidence. It was the ALJ’s prerogative to rely on Dr. Gilbert’s opinion rather than that of Dr. Menke.

We additionally noted Heritage has alleged the ALJ’s determinations are clearly erroneous which is tantamount to an alleged abuse of discretion. Abuse of discretion, in relation to the exercise of judicial power, is that which “implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007). Our review of the ALJ’s decision fails to establish that she abused her discretion in determining the extent of Mills’ impairment, and commensurate disability. Because we find substantial evidence supports the ALJ’s determination, we affirm.

Accordingly, the September 25, 2019 Opinion, Award, and Order rendered by Hon. Jane Rice Williams is hereby **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**COUNSEL FOR PETITIONER:**

**LMS**

HON ALLISON M HELSINGER  
HON LACEY D HICKS  
771 CORPORATE DR, STE 430  
LEXINGTON, KY 40504

**COUNSEL FOR RESPONDENT:**

**LMS**

HON MCKINNLEY MORGAN  
921 SOUTH MAIN STREET  
LONDON, KY 40741

**ADMINISTRATIVE LAW JUDGE:**

**LMS**

HON JANE RICE WILLIAMS  
MAYO-UNDERWOOD BLDG  
500 MERO STREET, 3<sup>rd</sup> FLOOR  
FRANKFORT, KY 40601