Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 17, 2018

CLAIM NO. 201800066

TINA MORGAN PETITIONER

VS. **APPEAL FROM HON. TANYA PULLIN, ADMINISTRATIVE LAW JUDGE**

LESLIE COUNTY BOARD OF EDUCATION
and HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART
& REMANDING
* * * * * *

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

STIVERS, Member. Tina Morgan ("Morgan") appeals from the July 19, 2018, Opinion and Order of Hon. Tanya Pullin, Administrative Law Judge ("ALJ"), in which she dismissed Morgan's low back injury claim for failure to prove a work-related injury.

On appeal, Morgan asserts Dr. James Owen's medical opinions support her injury claim. Morgan further asserts the ALJ erred by relying upon a previous back

surgery "which may or may not have occurred some six (6) years prior to the alleged injury date." We affirm on both issues on appeal; however, we vacate the complete dismissal of Morgan's claim for failure to prove a work-related injury and remand for additional findings.

The Form 101 alleges Morgan sustained work-related injuries to her "low back area (inc: lumbar and lumbo-sacral)" while in the employ of the Leslie County Board of Education ("Leslie Co.") on February 3, 2016, in the following manner: "Lifting heavy bags of trash to put into truck when injured low back."

Morgan was deposed on March 2, 2018. At the time of her alleged injury, Morgan was working as a custodian for Leslie Co. High School. She was hired full-time in January 2015, and she stopped working in October 2017. She testified concerning the duties she was required to perform as custodian:

> Q: The job duties of a school custodian I assume would include, number one, floor maintenance?
>
> A: Floor maintenance, right.
>
> Q: Did you use a machine such as commercial buffers or - ?
>
> A: I did not have to use the machines.
>
> Q: Just by hand?
>
> A: Right, by hand.
>
> Q: Did you have to do any sort of furniture moving?
>
> A: Very seldom.
>
> Q: Your job I assume was basically cleaning classrooms, restrooms, all the areas inside the school, offices, everything?

A: During the day I had to dust mop during the days in the halls. Clean the fountains, bathrooms, and I did the cafeteria and of course the offices. The Principals and Assistant Principals work and, yeah, and I did that.

Q: Did you have to do any type of maintenance or repair or did they have other people who did that?

A: Other people.

Q: No painting, fixing broken windows, working on doors?

A: No.

Q: Basically keeping the school clean?

A: Basically keeping everything clean, right.

She testified regarding the event resulting in her alleged injury:

A: I had to take all the trash out of the cafeteria and the kitchen also. What I would do is I would take the trash out of the big cans and put them into a big bin. Then after I would do all of that, after the lunch is over I had to take the big bin outside and take the trash out of the bin and put it back in the truck where they take the garbage from the truck up to their big bins.

Q: A garbage truck?

A: Yeah.

Q: You mean like one of the big ones with the --?

A: No, its [sic] like a pick up truck. Just a regular size pick up truck. We would have to put our trash in that and then take the pick up truck up on the hill and put that trash out of the truck into their big bins.

The garbage she was responsible for lifting could weigh as much as 50 pounds or more.

Morgan went to the emergency room after her alleged injury, and x-rays were taken. Morgan testified the x-rays did not reveal anything. She stopped working on October 7, 2017, because of her back pain:

> Q: What was the reason you stopped working approximately 20 months after the back injury occurred?
>
> A: Well I had to keep on working even though at the time I really wasn't one hundred percent able to go to work but you know I had to have insurance therefore I pushed myself and pushed myself to where it just got to the point to where I couldn't do it no [sic] more, it just kept getting worse and worse.
>
> Q: So you stopped working because of the back injury?
>
> A: Yes. Cause it kept getting worse.

Morgan opined she would be unable to return to her job as a custodian because of her back pain. "My back, and the pain runs all the way down into my leg if I go a long period of time or even a short period of time it hurts. Even my leg throbs all the way down to my foot." She described her current symptoms:

> Q: Ms. Morgan, is the pain in your low back area, is it present all the time or does it come and go?
>
> A: It's present all the time.
>
> Q: How would you describe the pain, is it a dull ache, a sharp pain, a burning pain, throbbing pain, or some combination of those?
>
> A: It is all of it. It is all of it.
>
> Q: All of the above?
>
> A: Yes. Numbness, aching, throbbing, yeah.
>
> Q: Do certain type of activities tend to aggravate your low back pain?

A: I can [sic] sit right now, it is killing me right now for sitting so long. I can't hardly sit. I can't walk a long period of time without it hurting.

Q: What about standing?

A: Standing, oh God, yes it hurts so bad, yes.

Q: How long can you stand or walk before you begin to notice increased pain?

A: Well, I, when I sit, right now, I mean if I start even sitting for [sic] short period of time I [sic] just start [sic] to throbbing [sic] all the way down. Right now, like I said it is throbbing bad.

Q: If you need to stand for a moment?

A: I would like to, it is, its' [sic] hurting.

Q: Approximately now long can you stand or walk before you begin to notice the increased pain?

A: Ok, like right now, yeah where I am standing, probably about fifteen minutes.

Q: How long can you sit before you begin to notice increased pain?

A: As soon as I sit down I start noticing the pain. It starts getting really dulling [sic].

Q: What about lifting or carrying or other exertional type activities, does that tend to increase the pain almost immediately.

A: Yes it does. Yes.

Q: Does your pain in your low back and your legs interfere with your ability to sleep and rest at night?

A: Yes.

Q: Are you up and down from time to time during the course of a normal night with the back pain?

A: Yes.

…

Q: If we assumed a pain scale from one to ten with one being the least amount of pain you could imagine and ten being the most severe pain you could imagine, where would you put your pain on that pain scale of one to ten when you are just being around the house on a normal day?

A: About a seven.

Q: If you stand or walk for extended periods, sit for extended periods, or do lifting or carrying or exertional type activities, what does that elevate the pain to?

A: A ten, about a ten.

Morgan testified she had a bone spur removed on her spine.

A: No. I had a spur removed on my spine, we are going back ten year [sic] ago, fifteen year [sic] ago, maybe.

Q: You had a spur?

A: A spur on my spine and had that removed.

Q: What part of the back?

A: It was down below a little bit but I had it removed and it's fine.

Morgan also testified at the May 31, 2018, Hearing. She clarified that, after her injury, she continued working full-time as a custodian until October 2017 when she could no longer perform her job duties. She testified the surgery to remove the bone spur relieved "some" of her back pain:

Q: Had you had surgery on your back at some point?

A: Yes.

Q: Okay. And, do you recall about when that was?

A: Probably, about ten or twelve years ago.

Q: Okay. And, had you had an injury to your back that required surgery?

A: No.

Q: Okay. And, what was the purpose of the surgery?

A: Spur. I had a spur that was hitting a nerve in my spine.

Q: Okay. And, following the surgery, did that completely relieve the back pain?

A: It did. It did. Yeah, I mean, some it did.

Q: Okay. When you say it relieved some, did you still have some back pain?

A: Very little.

Q: Okay.

A: I can deal with it. I mean very little.

Morgan filed the January 19, 2018, Independent Medical Evaluation report of Dr. Owen. After performing an examination and a medical records review, Dr. Owen diagnosed "[p]ersistent low back pain." He continued as follows:

> By her remembrance, worsening of the bulging disk certainly L4-5 right is deemed per MRI to be [sic] significant problem by Dr. Bean supposedly. He did not think it was necessary to operate on her. She definitely has paraspinal muscle spasm and tenderness in ranges of motion deficit but there is no definitive radiculopathy with primary sensory abnormality being on the right and straight leg raising being positive in the supine position but not sitting position.

Dr. Owen opined that the cause of her low back pain is the lifting of trash into the truck on February 3, 2016, and opined as follows:

> I think the low back is the cause of her complaint. I think the causation of the lifting the trash into the truck is likely to be the primary cause for the exacerbation of her low back pain although certainly review of the prior MRI was associated with the back surgery 6 years ago to verify the idea she has two more bulging disks now than she did back then. Would be appropriate.

Dr. Owen opined Morgan had no pre-existing active low back pain before the February 3, 2016, incident. He assessed a 7% whole person impairment rating for the low back injury, and opined Morgan should not return to her pre-injury work.

Leslie Co. filed the March 23, 2018, Orthopedic Examination report of Dr. Daniel Primm. After performing an examination and a medical records review, Dr. Primm set forth the following diagnoses:

> 1) Chronic low-back pain per history and medical record review; 2) soft-tissue lumbar strain secondary to 2/3/16 work-related lifting injury; 3) probable symptom magnification; 4) no evidence of significant or harmful change occurring as a result of the 2/3/16 lumbar strain injury.
>
> The report sets forth the following Q & A exchange:
>
> **1. Was there any permanent injury to the lumbar spine from throwing bags of garbage on February 3, 2016?**
>
> No. Based on everything I reviewed, I do not believe there is any objective evidence that this lady sustained a permanent injury to, or change in the condition of, the lumbar spine as a result of the lifting injury that occurred on 2/3/16.
>
> **2. Is there any impairment rating under the AMA Guides, 5th Edition, for the lumbar spine?**
>
> No. This lady had a pre-existing active impairment following her lumbar spine surgery, which was probably in the 5% to 7% range. However, I do not believe the most

recent strain injury resulted in any new or additional impairment.

3. If so, is any percentage of any impairment prior active, that is active and in existence and impairment ratable prior to February 3, 2016?

Yes, as above.

4. Please review the impairment ratings and causation opinions of Dr. Owen and advise if you have any disagreement. Please provide your medical rationale.

I disagree with Dr. Owen's assessments. I have a hard time understanding what type of possible sensory deficits he reported in her feet, and I could not understand his notes regarding those sensory findings. I found nothing in his examination that, in my mind as an orthopaedic surgeon, documented that he found any new or harmful change to her lumbar spine as a result of the 2/3/16 incident.

5. Does the Plaintiff retain the functional capacity to return to her past work for the Leslie County Board of Education or similar employment?

Yes. From an objective standpoint, I do feel this lady has the functional capacity to return to her past work or similar employment.

The May 8, 2018, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the ACT, exclusion for pre-existing disability/impairment, and TTD. Under "Other" is the following: "Retroactivity of recent legislative changes to KRS 342."

In the July 19, 2018, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

…

Work-relatedness/causation and Injury as defined by the Act

The first issue for determination is whether Plaintiff suffered a work-related in-jury as defined by the Act. KRS 342.0011(1) defines "injury" as "any work-related trau-matic [sic] event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings."

The claimant in a Workers' Compensation case bears the burden of proof and risk of non-persuasion for every element of her claim. Durham v. Peabody Coal Co., 272 S.W. 3d 192, 195 (Ky. 2008); Snawder v. Stice, 556 S.W. 2d 276 (Ky. App. 1979). Essen-tial [sic] elements include the work-relatedness/causation of any injury. Burton v. Foster Wheeler Corp., 72 S.W. 3d 925 (Ky. 2002). If the cause of a condition is not readily ap-parent [sic] to a layperson, medical testimony regarding causation is required. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W. 2d 184 (Ky. App. 1981). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W. 2d 165 (Ky. App. 1980).

After careful review of the lay and medical testimony, the ALJ finds that Plaintiff has not borne her burden of proving a work-related injury as a result of the February 3, 2016 work incident. In so doing, the ALJ found the medical testimony of Dr. Primm to be more persuasive than the testimony of Dr. Owen.

Dr. Owen opined that Plaintiff did not have a prior active impairment. Medical records and Plaintiff's testimony indicate back surgery approximately six years prior to the alleged injury date and ongoing prior low back pain thereafter. Further, Dr. Owen commented, "I think the lifting the trash into the truck is likely to be the primary cause for the exacerbation of her low back pain although certainly review of the prior MRI was associated with the back surgery six years ago to verify the idea she has two more bulging disks now than she did back then. Would be appropriate." Dr. Owen opined that Plaintiff had no prior active impairment and explained that his conclusion was based on Plaintiff's denial that she had

> any other radiating pain pre-existing. Dr. Owen, however, also said Plaintiff admitted to chronic back pain.
>
> Dr. Primm clearly opined, "No evidence of significant or harmful change occurring as a result of the 2/3/16 lumbar strain injury" and there is no "objective evidence that this lady sustained a permanent injury to, or change in, the condition of the lumbar spine as a result of the lifting injury that occurred on 2/3/16."
>
> Dr. Travis conducted a medical records review and concluded that Plaintiff "did not have a permanent injury to the lumbar spine on 2/3/16."
>
> Dr. Owen's uncertainty in his causation opinion makes his opinion less persuasive to the ALJ than the testimony of Dr. Primm. Additionally, the ALJ takes into account that the training and practice of Dr. Primm is in a specialty relevant to the alleged injury in this claim.
>
> Therefore, based on the medical testimony of Dr. Primm, the ALJ finds that Plaintiff has not borne her burden of proving work-related traumatic event was the proximate cause producing a harmful change in the human organism evidenced by objective medical findings as required by KRS 342.0011 (1).
>
> Having determined that Plaintiff did not sustain her burden on the threshold issue [sic] a work-related injury, the remaining contested issues in this claim are moot.
>
> No petition for reconsideration was filed.

Morgan's first argument, in essence, requests this Board to re-weigh the evidence and substitute its judgment for that of the ALJ. This we cannot do. The ALJ was well within her discretion in relying upon Dr. Primm instead of Dr. Owen in dismissing Morgan's claim for a *permanent* work-related injury to her low back stemming from the February 3, 2016, lifting incident. In his March 23, 2018, report, Dr. Primm opined Morgan did not sustain a permanent injury to her low back as a

result of the February 3, 2016, lifting incident. Dr. Owen's opinions, while supportive of Morgan's claim, merely represent conflicting evidence supporting a more favorable outcome. However, 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 substantial evidence of probative value does not support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Dr. Primm's medical opinions constitute substantial evidence supporting the ALJ's dismissal of Morgan's claim for a *permanent* work-related injury to her low back stemming from the February 3, 2016, lifting incident. Thus, we affirm on this issue.

In her second argument, Morgan asserts the ALJ erred by relying upon her previous low back surgery, "which may or may not have occurred," to remove a bone spur. Specifically, Morgan takes issue with the following language in the July 19, 2018, Opinion and Order: "Dr. Owens opined that Plaintiff did not have a prior active impairment. Medical records and Plaintiff's testimony indicate back surgery approximately six years prior the alleged injury date and ongoing prior low back pain thereafter." We affirm on this issue.

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).

The ALJ dismissed Morgan's claim for a permanent low back injury arising from the February 3, 2016, lifting incident based upon the opinions of Dr. Primm. After examining Morgan and conducting a medical records review, Dr. Primm opined Morgan did not sustain a *permanent* injury to the lumbar spine as a result of the February 3, 2016, lifting incident. This is not a case where the ALJ concluded Morgan sustained a permanent injury and the ALJ was required to engage in a carve-out for pre-existing active impairment pursuant to Finley vs. DBM Technologies, 217 SW3d 261 (Ky. App. 2007). Therefore, any extraneous language by the ALJ regarding Morgan's prior low back surgery, as well as Dr. Primm's opinions regarding Morgan's pre-existing active low back condition and his impairment rating for the same, are immaterial. That said, although this Board acknowledges the records pertaining to Morgan's low back surgery to remove a bone spur were not filed in the record, Morgan testified regarding this surgery during her deposition and at the hearing. At the hearing, she unambiguously testified she still experienced some back pain following the surgery. Morgan's testimony does not support her claim the ALJ's reference to the surgery and residual back pain is speculative.

Notably, Morgan failed to file a petition for reconsideration contesting the ALJ's alleged erroneous findings with respect to Morgan's prior surgery and her low back condition following the surgery. An ALJ must be afforded the opportunity to make any corrections, via a petition for reconsideration, concerning any perceived

misunderstanding of the evidence. An award or order of the ALJ shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed. KRS 342.285. Absent a petition for reconsideration, questions of fact, including the adequacy of the ALJ's findings of fact, are not preserved for appellate review. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81, 83 (Ky. 2005). *See also* Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 223 (Ky. 2013). Stated otherwise, 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 ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985). As Morgan failed to file a petition for reconsideration on this issue, the ALJ's findings of fact must be affirmed.

That said, we vacate the complete dismissal of Morgan's claim and remand for additional findings.

The July 19, 2018, Opinion and Order dismissing Morgan's claim firmly demonstrates the ALJ based her decision upon the medical opinions of Dr. Primm. As the ALJ stated, "based on the medical testimony of Dr. Primm, the ALJ finds that Plaintiff has not borne her burden of proving [sic] work-related traumatic event was the proximate cause producing a harmful change in the human organism evidenced by objective medical findings as required by KRS 342.0011(1)." However, a review of Dr. Primm's March 23, 2018, IME report reveals he diagnosed a "soft-tissue ***lumbar strain*** secondary to 2/3/16 work-related lifting injury." (emphasis added). Even though Dr. Primm opined Morgan did not sustain a permanent injury meriting a permanent impairment rating as a result of the February 3, 2016, lifting incident, he

diagnosed a temporary lumbar strain due to the work event. Clearly, Dr. Primm concluded Morgan sustained a temporary work injury. Therefore, the complete dismissal of Morgan's claim for failure to prove she sustained a work-related lumbar spine injury is erroneous, since Dr. Primm's medical opinions establish Morgan sustained a work-related temporary lumbar spine injury.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability because of his injury. Therefore, the ALJ found the claimant was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Id. at 286.

Here, the ALJ determined Morgan did not sustain a permanent lumbar spine injury due to the February 3, 2016, lifting incident; however, the ALJ did not address whether she sustained a temporary injury. Therefore, we must remand the

claim to the ALJ for a determination Morgan sustained a temporary lumbar spine injury due to the February 3, 2016, lifting incident, and whether she is entitled to temporary total disability ("TTD") benefits and medical benefits, including future medical benefits.[1] We note the May 8, 2018, BRC Order indicates Leslie Co. did not pay TTD benefits or medical expenses. The ALJ is entitled to exercise her discretion in making a determination regarding entitlement to future medical benefits. *See* FEI Installation, Inc. v. Williams, 214 S.W.3d 284 (Ky. 2001); *see also* Mullins v. Mike Catron Construction/Catron Interior Systems, Inc., 237 S.W.3d 561 (Ky. App. 2007). The ALJ may make any determination she deems appropriate as long as it is supported by the evidence. We direct no particular result.

Accordingly, concerning the two issues Morgan raises on appeal, the July 19, 2018, Opinion and Order is **AFFIRMED**. We **VACATE** the ALJ's complete dismissal of Morgan's claim and **REMAND** for additional findings consistent with the views set forth herein.

ALL CONCUR.

[1] While it appears Morgan missed no work following the February 3, 2016, lifting incident, it is not for this Board to make such a determination.

DISTRIBUTION: **METHOD**

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