

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 21, 2018

CLAIM NO. 201301439

TYSON FOODS INC.

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

SIXTA CARMONA
and HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

STIVERS, Member. Tyson Foods Inc. (“Tyson”) seeks review of the August 13, 2018, Order on Remand of Hon. Stephanie Kinney, Administrative Law Judge (“ALJ”) awarding temporary total disability (“TTD”) benefits to Sixta Carmona (“Carmona”) from May 23, 2013, through August 5, 2016. Tyson also appeals from the September 4, 2018, Order sustaining its petition for reconsideration and amending the award to reflect Carmona is entitled to TTD benefits from May 23, 2013, through March 18,

2016. The ALJ also granted Tyson a credit for TTD benefits previously paid pursuant to Triangle Insulation and Sheet Metal Co., a Div. of Triangle Enterprises, Inc. v. Stratemeyer, 782 S.W. 2d 628 (Ky. 1990).

On appeal, Tyson contends the ALJ's determination of the date of maximum medical improvement ("MMI") is erroneous as a matter of law. In a related argument, Tyson contends the date of MMI is not supported by substantial evidence.

BACKGROUND

We adopt the procedural background as set forth in our June 8, 2018, Opinion Affirming in part, Vacating in part, and Remanding:

Carmona filed a Form 101 on September 23, 2013 alleging she developed bilateral upper extremity pain from January 19, 2012 through January 23, 2012. She alleged bilateral upper extremity injuries on January 19, 2012 while attempting to catch a pack of twenty-five boxes. Carmona alleged a right upper extremity injury on January 5, 2013 when she collided into a door. Carmona alleged an injury to her left elbow on February 25, 2013 when a maintenance worker struck her left arm with a stainless steel step. The claim was assigned to Hon. Robert L. Swisher, former Administrative Law Judge, ("ALJ Swisher") and subsequently re-assigned to the ALJ.

Carmona testified she worked for Tyson in the chicken processing plant from September 12, 2011 to May 23, 2013 on the production line and in the box room. Carmona indicated that prior to January 2011, she never experienced symptoms in either hand, wrist or arm. Carmona does not believe she can return to her former job with Tyson due to her bilateral upper extremity condition.

The medical evidence indicates Carmona was previously assigned permanent restrictions based upon Tyson's August 24, 2011 pre-employment physical. Apparently, a nerve conduction study demonstrated abnormal results. Carmona was restricted from live

catching and hanging, pulling skins or tenders, use of vibratory tools, and she was limited to knife or scissor use upon commencement of her employment with Tyson.

Carmona first sought treatment for her January 19, 2012 injury at WorkHealth with Alicia Terry, PA-C, who treated her conservatively with medication and physical therapy.

Carmona regularly treated with Dr. Casie Mosley, her primary care physician, and Dr. Judith Canlas for her bilateral upper extremity condition. Carmona began treating with Dr. Mosley in August 2012, and consistently complained of bilateral hand and wrist symptoms. Dr. Mosley treated Carmona conservatively with medication, wrist splints, and physical therapy. She also referred Carmona to Dr. Canlas, who began treating her in April 23, 2013. Dr. Canlas noted Carmona reported work-related injuries on January 19, 2012 and January 4, 2013 resulting in pain in her bilateral shoulders, elbows, and wrists, as well as numbness and tingling in her hands. Among other treatment, Dr. Canlas ordered an EMG/NCV study for suspected carpal tunnel syndrome. The April 25, 2013 study findings were consistent with bilateral carpal tunnel syndrome and left cubital tunnel syndrome. Thereafter, Dr. Canlas diagnosed Carmona with bilateral carpal tunnel syndrome and referred her to a hand surgeon. Similarly, Dr. Mosley provided the identical diagnoses and repeatedly referred her to a hand surgeon from June 2013 to April 2014.

Carmona also treated with Dr. Jacob O'Neill on April 4, 2012, who diagnosed complaints of bilateral wrist and hand pain, and non-work-related osteoarthritic changes in the joints of her left thumb and right index finger. He noted Carmona's multiple subjective complaints did not correspond to the objective findings on examination. He opined Carmona had attained MMI and required no further treatment. He found Carmona's injury did not warrant a permanent impairment rating pursuant to the 6th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides").

Carmona treated with Dr. J. Criss Yelton on March 11, 2013. Dr. Yelton noted the January 2013

incident where a door hit Carmona on the right forearm. Dr. Yelton diagnosed a right forearm contusion and predicted a complete recovery. Dr. Yelton noted Carmona's symptoms are inconsistent with the clinical findings.

Carmona filed Dr. Barefoot's December 17, 2013 report. He diagnosed bilateral median nerve neuropathy and left ulnar nerve neuropathy confirmed by the April 25, 2013 electro-diagnostic studies. Pursuant to the 5th Edition of the AMA Guides, Dr. Barefoot assessed a 16% impairment for the right upper extremity and a 23% impairment rating for the left upper extremity, for a combined 34% impairment rating. Dr. Barefoot apportioned 100% of the impairment rating to Carmona's work injuries. Dr. Barefoot recommended a referral to a hand surgeon for evaluation for possible surgical intervention and noted she will need ongoing treatment for her condition. Dr. Barefoot also assigned restrictions. Dr. Barefoot did not specifically address MMI in his report.

In a May 20, 2014 addendum, Dr. Barefoot disagreed with the opinions of Dr. Jeanna Lee. He also opined that although Carmona had abnormal pre-employment nerve conduction studies, she was asymptomatic when she began working for Tyson, but the condition was dormant and non-disabling. Dr. Barefoot opined her workplace activities aroused her condition into a symptomatic and disabling state.

Tyson filed Dr. Lee's May 13, 2014 report, and she also testified by deposition on June 13, 2014. Dr. Lee opined Carmona most likely sustained some minor strains and contusions due to her work-related injuries. Dr. Lee opined Carmona's current bilateral upper extremity complaints are unrelated to any work accidents. Dr. Lee found Carmona's subjective complaints did not correspond to objective findings on examination. Dr. Lee opined Carmona reached MMI for each work injury within a few weeks after each specific incident. She found Carmona did not qualify for a permanent impairment rating and required no future medical treatment for her work-related injuries. Dr. Lee opined Carmona's bilateral carpal tunnel syndrome and ulnar neuropathy are unrelated to her work activities with Tyson.

ALJ Swisher entered an interlocutory order on September 8, 2014. He found Carmona sustained a work-related injury to her upper extremities on January 19, 2012 and her repetitive work activities aggravated and exacerbated those injuries resulting in symptomatic bilateral carpal tunnel syndrome and left cubital tunnel syndrome. ALJ Swisher also found Carmona was asymptomatic with respect to her bilateral upper extremities upon entering her employment with Tyson, and the January 19, 2012 incident, as well as her ongoing work activities, aroused a pre-existing dormant condition into disabling reality. Therefore, ALJ Swisher found Carmona's bilateral carpal tunnel syndrome and left ulnar nerve cubital tunnel syndrome directly and causally related to the work injuries. ALJ Swisher relied upon Drs. Canlas, Mosley and Barefoot. ALJ Swisher additionally found the January 5, 2013 work accident resulted in only a right forearm contusion, which resolved and does not warrant an award of PPD or medical benefits.

ALJ Swisher found Carmona "has not reached [MMI] and is entitled to be referred to and evaluated by an orthopedic surgeon/hand specialist for a determination as to whether surgical intervention is appropriate." The ALJ found Carmona was entitled to TTD benefits beginning on May 23, 2013 and until such time she reached MMI or a level of improvement allowing her to return to her regular employment with Tyson. ALJ Swisher ordered Tyson to pre-authorize Carmona's referral to an orthopedic surgeon/hand specialist, awarded TTD benefits beginning on May 23, 2013, and placed the claim in abeyance.

The claim was re-assigned to the ALJ on January 5, 2015. Subsequently, Carmona suffered from a myocardial infarction on April 20, 2015, resulting in implantation of two stents, and a stroke in November 2015. Her cardiologist advised Carmona she would be unable to undergo any type of surgery for up to a year in a May 21, 2015 letter.

The claim was removed from abeyance on May 3, 2017. Carmona was evaluated by Dr. Scott Farner on August 5, 2016, who noted Carmona complained of bilateral hand numbness and tingling, and there was electrodiagnostic evidence of carpal tunnel syndrome and cubital tunnel syndrome. He also noted Carmona

demonstrated severe symptom magnification. He opined Carmona, “is not likely to have a good result with surgery. I do not plan to intervene surgically in this patient.” He referred Carmona to Dr. Tsu-Min Tsai, a physician in the same practice, for a second opinion. In an April 7, 2017 letter, Dr. Farner opined Carmona’s symptoms did not arise from work and are the result of the normal aging process and/or other factors. In a February 22, 2017 letter, Dr. Tsai opined Carmona’s cervical issues are unrelated to her hand injury or work.

Carmona filed Dr. Barefoot’s report from an April 19, 2017 evaluation. He performed an examination and reviewed additional medical records. He confirmed his prior diagnoses of bilateral median nerve neuropathy and left ulnar nerve neuropathy, and reiterated his opinion as to causation. Dr. Barefoot again assessed a 34% impairment rating. He noted his agreement with the hand surgeon’s opinion that Carmona is a poor surgical candidate. Dr. Barefoot did not specifically address MMI in the April 19, 2017 report.

Tyson submitted Dr. Thomas Gabriel’s February 6, 2017 report. He also testified by deposition on May 16, 2017. He opined the January 19, 2012 and January 2013 work accidents resulted in a strain or contusion and are not the cause of her current subjective complaints of numbness and tingling. He opined Carmona’s nerve compression is pre-existing and chronic, and was neither aggravated nor accelerated by her short employment with Tyson. He noted Carmona’s subjective complaints outweighed the clinical exam or diagnostic finding. He also diagnosed Carmona with chronic pain, chronic bilateral carpal tunnel syndrome, and bilateral thumb CMC arthritis, unrelated to the January 19, 2012 work injury. For the January 19, 2012 injury, Dr. Gabriel opined Carmona reached MMI on April 4, 2012. For the January 2013 injury, Dr. Gabriel opined Carmona reached MMI on March 11, 2013. Dr. Gabriel found Carmona’s work injuries warranted no impairment rating and no further treatment.

A benefit review conference (“BRC”) was held May 3, 2017. The parties stipulated Carmona sustained an alleged/ disputed work injury on January 19, 2012. The BRC order reflects Tyson paid TTD benefits at the rate of \$257.58 per week from May 23, 2013 through

March 8, 2017 for a total of \$52,608.22, as well as medical expenses totaling \$8,336.15. This stipulation was later amended to reflect Tyson paid TTD benefits through June 14, 2017 for a total of \$54,606.96. The parties identified the following contested issues: benefits per KRS 342.730, including permanent total disability and multipliers; work-relatedness/causation; injury as defined by the Act; TTD, including overpayment and duration; and future medicals.

In the September 18, 2017 opinion, the ALJ re-examined the issue of work-relatedness and causation. She reviewed the findings made by ALJ Swisher in the September 8, 2014 interlocutory opinion, as well as additional evidence submitted since that time. The ALJ declined to disturb ALJ Swisher's finding Carmona sustained a work-related injury to her upper extremities on January 19, 2012, relying upon Drs. Mosley, Canlas, and Barefoot.

In analyzing Carmona's entitlement to TTD benefits, the ALJ first reviewed the cases of Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004); W.L. Harper Construction Co. v. Baker, 858 S.W.2d 202 (Ky. App. 1993); Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000); Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015) and Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016). The ALJ provided the following analysis:

The Defendant has paid [TTD] benefits at the rate of \$257.58/week from May 23, 2013 through March 8, 2017, as stipulated at the Benefit Review Conference on May 3, 2017. The Defendant asserts there has been an overpayment of temporary total disability benefits as to rate. The Defendant argues Plaintiff reached MMI on April 4, 2012, relying on Dr. Gabriel. This ALJ, however, does not believe Plaintiff reached MMI prior to an evaluation with a hand surgeon to determine if surgery was indicated. Thus, this ALJ is not persuaded by the Defendant's arguments on this issue. Therefore, Plaintiff is awarded temporary total disability benefits at the rate of

\$257.58/week from May 23, 2013 through March 8, 2017.

The ALJ next found Carmona retains a 34% impairment rating due to the work injury, relying upon Dr. Barefoot and the presence of objective diagnostic testing, surgical recommendations and ongoing restrictions. The ALJ found Carmona is also entitled to the three multiplier. The ALJ found Carmona is not permanently and totally disabled, and therefore awarded TTD benefits from May 23, 2013 through March 8, 2017, PPD benefits, and medical expenses.

Tyson filed a petition for reconsideration asserting the ALJ erred in awarding TTD benefits through March 8, 2017 since she attained MMI on either April 4, 2012, March 11, 2013 or December 17, 2013. Tyson argued the ALJ erred in stating she was, “not inclined to find Carmona has no permanent impairment rating based on objective diagnostic testing findings, surgical recommendations and ongoing restrictions.” Tyson also argued the ALJ mistakenly awarded TTD and PPD benefits to be paid during the same timeframe, May 23, 2013 through March 8, 2017.

In the February 19, 2018 order on reconsideration, the ALJ made the following additional findings regarding TTD benefits:

The Defendant argues the only hand surgeon that examined Plaintiff was Dr. Thomas Gabriel, who examined Plaintiff on February 6, 2017. Dr. Gabriel placed Plaintiff at maximum medical improvement on April 4, 2012 for the first injury and March 11, 2013 for the second. The Defendant also notes Dr. Barefoot felt Plaintiff reached maximum medical improvement on December 17, 2013, upon his first evaluation.

This ALJ does not believe Plaintiff reached maximum medical improvement prior to the issuance of CALJ Swisher’s interlocutory opinion of September 8, 2014. Chief ALJ Swisher found Plaintiff was not at maximum medical

improvement and ordered the pre-authorization of a referral to a hand specialist/hand surgeon. Plaintiff sought treatment with multiple hand specialists and was ultimately determined to be a poor surgical candidate. Considering Plaintiff's treatment following the interlocutory opinion and consultations with Drs. Farner and Tsai, this ALJ is simply not inclined to find Plaintiff reached maximum medical improvement prior to September 8, 2014, the date of the interlocutory opinion. Thus, this ALJ rejects Dr. Gabriel's proposed date of maximum medical improvement and finds Plaintiff is entitled to temporary total disability benefits from May 23, 2013 through March 8, 2017 at the rate of \$257.58/week.

Recognizing no physician has formally recommended surgery, the ALJ stated she was still not inclined to find Carmona retains no permanent impairment rating due to the work injury since her diagnostic studies evidence a significant upper extremity condition, her restrictions prevent her from returning to her pre-injury job duties, and numerous physicians indicated a referral to a hand surgeon was necessary. The ALJ stated she was unpersuaded by the opinions of Drs. Farner and Tsai since they did not render treatment until "many, many months after her symptoms manifested." The ALJ also clarified the award of benefits to reflect the award of PPD benefits shall be suspended during any period of TTD benefits.

In its first appeal, Tyson argued the ALJ erred in awarding TTD benefits through March 8, 2017, since Carmona reached MMI prior to that date. Tyson asserted there were three possible dates of MMI. The first two dates were either April 4, 2012, or March 11, 2013, as determined by Dr. Thomas Gabriel, and the third date was December 17, 2013, as determined by Dr. Jules Barefoot in his initial report of December 17, 2013. Tyson asserted that rather than rely upon one of the three dates,

the ALJ erroneously arrived at an arbitrary date of March 8, 2017. Tyson also contested the award of PPD benefits.

This Board affirmed the finding Carmona sustained a work-related injury and the award of PPD benefits based on a 34% impairment rating. However, we vacated the award of TTD benefits holding as follows:

With that said, we vacate in part and remand for the ALJ to determine when Carmona attained MMI from her work injury. KRS 342.0011(11)(a) defines TTD as follows:

‘Temporary total disability’ means the condition of an employee who has not reached maximum medical improvement [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined. (emphasis added)

Section 2.4 of the AMA Guides directs as follows:

2.4 When Are Impairment Ratings Performed?

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static

and well stabilized, often termed the date of **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living. (original emphasis)

The ALJ awarded TTD benefits through March 8, 2017, presumably the date Tyson ceased voluntarily paying TTD benefits as stipulated at the May 3, 2017 BRC. The ALJ did not make a specific finding regarding when Carmona reached MMI. Rather, the ALJ only determined Carmona did not reach MMI prior to an evaluation with a hand surgeon to determine if surgery was indicated. Similarly, in the order on reconsideration, the ALJ found Carmona did not reach MMI prior to the September 8, 2014 interlocutory order, and therefore rejected Dr. Gabriel's proposed date of MMI. The ALJ again found Carmona entitled to TTD benefits from May 23, 2013 through March 8, 2017. In both the opinion and order on reconsideration, the ALJ failed to make a specific finding of when Carmona reached MMI from her January 19, 2012 work injury. She merely determined that MMI was not reached prior to the interlocutory opinion. The cessation of voluntary payment of TTD benefits by an Employer does not automatically establish MMI. **Therefore, we vacate the award of TTD benefits and remand the claim to the ALJ with directions to determine, based upon the medical evidence, when Carmona reached MMI from her January 19, 2012 work-related injury and award TTD benefits accordingly.** We direct no particular result, and decline to limit the ALJ's analysis to the three potential dates as argued by Tyson. (emphasis added).

On remand, the ALJ provided the following additional findings of fact and conclusions of law:

The only issue remanded to this ALJ is the date Plaintiff reached maximum medical improvement for her January 19, 2012 work injury. The ALJ has once again reviewed the evidence, and finds Plaintiff reached maximum medical improvement on 8/5/2016, relying on Dr. Farner's treatment records.

Dr. Gabriel evaluated Plaintiff multiple times throughout the pendency of this claim. Most recently, Dr. Gabriel evaluated Plaintiff on 2/6/2017, and opined Plaintiff reached maximum medical improvement on 4/4/2012 "as determined by Dr. Jacob O'Neill." Drs. Gabriel and O'Neill's proposed dates of maximum medical improvement precede Plaintiff's treatment and surgical pursuit.

Dr. Barefoot also evaluated Plaintiff multiple times in conjunction with this claim. Dr. Barefoot last examined Plaintiff on 4/19/2017, but did not squarely address maximum medical improvement. Previously, Dr. Barefoot evaluated Plaintiff on 12/17/2013 and assessed 34% permanent impairment. However, Dr. Barefoot felt Plaintiff required a referral to a hand surgeon.

Plaintiff sought treatment with a hand specialist following CALJ Swisher's interlocutory opinion and pursued surgical options. As previously indicated, this ALJ does not feel Plaintiff reached maximum medical improvement prior to CALJ Swisher's interlocutory opinion on 9/8/2014. Essentially, this ALJ is not convinced Plaintiff reached maximum medical improvement until after surgery was pursued and ultimately not recommended by Dr. Farner.

Plaintiff suffered a myocardial infarction following CALJ Swisher's interlocutory decision. In a letter, dated 5/21/2015, Plaintiff's treating cardiologist indicated Plaintiff would be unable to undergo any type of surgery for up to a year. Plaintiff eventually came under the care of Dr. Farner. Plaintiff last saw Dr. Farner on 8/5/2016. At that time, Dr. Farner noted Plaintiff indicated she received surgical clearance from her treating cardiologist. However, Dr. Farner indicated Plaintiff would not have

a good result following surgery. As such, this ALJ finds Plaintiff reached maximum medical improvement on 8/5/2016, the date she exhausted conservative treatment and surgery was not recommended. In making this finding, the ALJ relies on Dr. Farner's treatment records.

This ALJ has considered Defendant's argument Plaintiff reached maximum medical improvement on either 4/4/2012, 3/11/2013 or 12/17/2013. Likewise, the WCB also considered this argument. On remand, the WCB did not direct a particular result and declined to limit this ALJ's analysis to the three potential dates, as argued by Defendant. This ALJ has weighed the evidence, and finds Defendant's proposed dates of maximum medical improvement are not justified by Plaintiff's treatment records.

Plaintiff is awarded temporary total disability benefits at the rate of \$257.58/week from 5/23/2013 through 8/5/2016, the date Plaintiff reached maximum medical improvement.

Tyson filed a petition for reconsideration contending the finding of August 5, 2016, as the date of MMI was patently erroneous and not supported by medical evidence. It cited to Dr. Scott Farner's April 7, 2017, letter in which he stated he and Dr. Tsu-Min Tsai agreed Carmona's symptoms do not arise from her work. Tyson also referenced Dr. Farner's March 18, 2016, record in which he stated Carmona was not likely to have a good result with surgery and he did not plan to intervene surgically. Tyson argued Carmona's subjective complaints did not change between April 4, 2012, the date Dr. Gabriel assigned MMI, and the final hearing. Thus, it contended the MMI date should be determined in accordance with Dr. Gabriel's opinion. Significantly, Tyson asserted, in the alternative, as follows: "if the date the Plaintiff was deemed to be a poor surgical candidate is used as the date of MMI, then March 18, 2016 is the appropriate MMI date."

The ALJ sustained the petition for reconsideration finding as follows:

This ALJ has reviewed the evidence. This ALJ is not convinced Plaintiff reached maximum medical improvement on 4/4/2012, the date opined by Dr. Gabriel. As set forth previously, this ALJ is not convinced Plaintiff reached maximum medical improvement until after surgery was pursued. As such, this ALJ finds cause to reject Dr. Gabriel's opinion regarding maximum medical improvement.

Surgery was considered in this claim, but ultimately it was not recommended. However, this decision was prolonged as Plaintiff was unable to obtain clearance from her treating cardiologist. In a letter, dated 5/21/2015, Plaintiff's treating cardiologist indicated she would not be able to undergo any type of surgery for at least a year. Plaintiff returned to Dr. Farner on 3/18/2016, and while Dr. Farner opined Plaintiff was not a surgical candidate, he did refer her to "TMT for second opinion (option to treat)." Thus, at this juncture it appears Dr. Farner had exhausted treatment modalities to improve Plaintiff's condition. As such, this ALJ finds Plaintiff reached maximum medical improvement on 3/18/2016, relying on Dr. Farner's treatment records. Consequently, Plaintiff is awarded temporary total disability benefits at the rate of \$257.58/week from 5/23/2013 through 3/18/2016. Defendant is entitled to a credit for temporary total disability benefits previously paid.

Pursuant to the alternative suggestion of Tyson, the ALJ awarded TTD benefits from May 23, 2013, through March 18, 2016, with Tyson to take the appropriate credit for TTD benefits previously paid.

On appeal, Tyson asserts the date of MMI is a medical question to be answered by medical experts. Thus, the ALJ did not have the authority to adopt an MMI date that is not established by medical experts. Tyson notes Dr. Gabriel was the only hand surgeon to examine Carmona and after conducting a February 6, 2017, examination, he determined she reached MMI no later than March 11, 2013. It also notes Dr. Barefoot, after his first examination, concluded Carmona had attained MMI

on December 17, 2013. Tyson argues that, rather than adopt one of these dates, the ALJ rejected the expert testimony and relying upon her own judgment arrived at March 18, 2016, as the date of MMI. Since the ALJ exceeded the scope of her authority, Tyson maintains the award should be vacated and the claim remanded for further findings regarding the date of MMI.

In a related argument, Tyson asserts that even if the ALJ acted within the scope of her authority, her finding of MMI is not supported by substantial evidence. It contends Carmona's subjective complaints did not change during the intervening years. As such, her condition was stable for more than a year without medical treatment, thus confirming the experts who placed her at MMI in 2013. Even though the ALJ relied upon Dr. Farner's treatment records in determining MMI to be March 18, 2016, Tyson notes both Dr. Farner and his partner, Dr. Tsu-Min Tsai, concluded Carmona's complaints were not related to the work injury. Tyson argues that, in the absence of any evidence showing Carmona's condition substantially changed, the ALJ erred in extending the period of TTD benefits while Carmona was treated for a non-related condition. Again, Tyson requests the award be vacated and the claim remanded for further findings. We affirm.

We begin by noting this Board affirmed the award of PPD benefits and addressed the discretion afforded the ALJ on remand in arriving at the date of MMI. The decision of the Board was not appealed. Thus, it is the law of the case. In McGuire v. Coal Ventures Holding Co., Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published, the Kentucky Supreme Court explained that the

Board's decision is the law of the case and must be followed in subsequent proceedings in that same case.

The doctrines of *res judicata* and the law of the case relate to the preclusive effect of previous judicial decisions. *Res judicata*, a Latin term meaning "a matter adjudged," stands for the principle that a final judgment on the merits is conclusive of causes of action (claim preclusion) and facts or issues (issue preclusion/collateral estoppel) thereby litigated as to the parties and their privies. [footnote omitted] The law of the case doctrine concerns the preclusive effect of judicial determinations in the course of a single litigation before a final judgment. [footnote omitted] As applied to workers' compensation cases, a final decision of law by an appellate court [footnote omitted] or the Board [footnote omitted] establishes the law of the case and must be followed in all later proceedings in the same case.

In 2017, Dr. Barefoot authored a second report in which he reaffirmed his 34% impairment rating. In that report, Dr. Barefoot did not address MMI. As noted by Tyson, Dr. Gabriel saw Carmona on February 6, 2017, and concluded she attained MMI as a result of the January 19, 2012, injury on April 4, 2012. He also opined the date MMI was attained for the January 2013 injury was March 13, 2013. The ALJ rejected Dr. Gabriel's opinions choosing to rely upon Dr. Farner's opinion expressed on March 18, 2016, that he would not perform surgery because Carmona would likely not obtain a good result. The March 18, 2016, medical record of Dr. Farner reflects a diagnosis of bilateral arm pain and numbness and multiple nerve compression. Accordingly, Dr. Farner ruled out Carmona as a surgical candidate stating as follows: "B hand numbness and tingling. Pt with electrodiagnostic evidence of CTS and CuTS but pt with severe symptom magnification. In my opinion, she is not likely to have a good result with surgery. I do not plan to intervene surgically in this patient." Dr.

Farner saw Carmona on August 5, 2016, and allowed her to return to work on alternate duty with significant work restrictions. Dr. Farner did not address the possibility of surgery in the August 2016 record.

Although Drs. Farner and Tsai did not relate Carmona's symptoms to the work injury, the ALJ is vested with the discretion to reject those opinions, but still rely upon Dr. Farner's opinion of March 18, 2016, that Carmona was not a good surgical candidate. 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). An 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). Although a party may note evidence that would have supported a different outcome than that 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).

This Board previously refused to direct the ALJ to choose from three potential dates of MMI as suggested by Tyson. MMI is defined by the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment as follows:

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximal medical improvement (MMI). It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed. The *Guides* attempts to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living. (original emphasis)

Based upon the above definition, the ALJ could reasonably discern from Dr. Farner's March 18, 2016, record that March 18, 2016, was the date from which "further recovery or deterioration is not anticipated although over time there may be some expected change." On that date, Dr. Farner unequivocally ruled out Carmona as a surgical candidate as he did not believe a good result could be achieved. This medical opinion permitted a finding Carmona had attained MMI on that date.

Consequently, in the September 4, 2018, Order the ALJ correctly amended the award of TTD benefits to reflect Carmona had reached MMI on March 18, 2016. We previously instructed the ALJ, based on the medical evidence, to determine an MMI date. Since Dr. Farner's opinion contained in the March 18, 2016, medical report constitutes the requisite medical evidence supporting the ALJ's determination of MMI, this Board has no authority to invade the ALJ's reliance upon that report in determining the date of MMI. We also note the determined MMI date does not adversely affect the ALJ's reliance upon Dr. Barefoot's impairment rating, since on April 19, 2017, he reaffirmed his previously assessed 34% impairment rating.

Finally, we find Tyson's position on appeal is rather disingenuous since it suggested March 18, 2016, as an alternate date of MMI. Now, it complains about the very date it suggested. Because Dr. Farner's March 18, 2016, office note constitutes substantial evidence supporting the ALJ's determination when Carmona reached MMI, we must affirm.

ALL CONCUR.

DISTRIBUTION:

METHOD

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