

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-213

DIANA VAUGHAN

APPELLANT

V.

APS SERVICES, LLC
HARTFORD INSURANCE CO.

APPELLEES

Opinion Delivered October 8, 2008

APPEAL FROM ARKANSAS
WORKERS' COMPENSATION
COMMISSION [E712283]

AFFIRMED

WENDELL L. GRIFFEN, Judge

In an opinion dated October 11, 2006, the Commission unanimously found, among other things, that appellant Diana Vaughan was entitled to temporary-total-disability benefits through June 15, 2005. In so finding, it relied upon a medical record referring to another person.¹ We reversed that opinion and remanded for a full examination of the evidence presented. *See Vaughan v. APS Servs., LLC*, 99 Ark. App. 267, 259 S.W.3d 470 (2007). On remand, the Commission found that appellant failed to prove entitlement to temporary-total-disability benefits after January 26, 2005. Appellant appeals again, contending that the Commission has issued another opinion not supported by substantial evidence. She also contends that by virtue of the previous opinion, the Commission erred in finding that she

¹The record relied upon by the Commission was intended to show that appellant's treating physician at the time had intended to refer her to another doctor, as he (her treating physician) was leaving the state.

reached maximum medical improvement at some point before June 15, 2005. We affirm, holding that the Commission's decision is supported by substantial evidence, despite the fact that it previously placed the end of appellant's healing period at a later date.

Background Facts

On September 17, 1997, appellant was working as a temporary employee in a discount bakery when she suffered an admittedly compensable injury involving pain to her neck, right shoulder, and right arm. When the pain did not subside, appellees recommended that she see her family physician. Appellees paid some benefits, but later controverted appellant's entitlement to additional benefits. The Workers' Compensation Commission eventually became very familiar with appellant's injury. The first hearing was held on July 17, 1998, where appellant contended that she was entitled to additional medical treatment and temporary-total-disability benefits. The ALJ agreed, finding that appellee was still within her healing period. The Commission affirmed and adopted the opinion of the ALJ, and no further appeal was taken. At a second hearing held June 2, 2000, the parties litigated appellant's entitlement to additional medical treatment, a change of physician, and temporary-total-disability benefits. The ALJ found that appellant had developed reflex sympathetic dystrophy as a result of her compensable injury. With respect to her total-temporary-disability benefits, the ALJ found that appellant was still within her healing period and was still entitled to benefits until a date yet to be determined. A third hearing was held on October 3, 2003, during which appellant contended that she was entitled to penalties for appellee's failure to pay temporary-total-disability benefits. The ALJ found that appellant was still entitled to

those benefits, but not to associated penalties.

The hearing in the present case was held on December 8, 2005, where the parties again contested appellant's entitlement to temporary-total-disability benefits. At the hearing, appellant complained of problems in her neck and shoulders, across her shoulder blades, and in the lower right side of her neck. She stated that she went from a burning pain in her shoulder to not being able to move her right upper extremity. A doctor had implanted a spinal column stimulator, allowing appellant to reduce her dependence on narcotics and tolerate the pain. She thought that her left arm worked well enough that she could try to obtain her commercial driver's license. Unfortunately, she failed the exam. She opined that she had made enough progress that she was "getting back to what I would almost call my normal self." However, she testified that to her knowledge, no doctor had released her to work or indicated that she had reached the end of her healing period. On cross-examination, appellant stated that she did not know if she could do any work, but acknowledged that she had not sought employment.

While the record includes an extensive medical history, it might be helpful to start on September 10, 2002, the date that Dr. William Ackerman referred appellant to Dr. Richard Jordan for an evaluation whether she would benefit from a dorsal column stimulator. Dr. Ackerman opined that if Dr. Jordan did not feel that the stimulator would help appellant, then appellant would be at maximum medical improvement. Dr. Jordan implanted the stimulator in October 2002, and appellant reported "amazing improvement" of her condition. Dr. Ackerman wrote that appellant's condition was showing objective changes; consequently, she

had not reached maximum medical improvement. Most of appellant's subsequent treatment consisted of injections. On May 6, 2003, Dr. Ackerman reported that appellant's RSD had shown both improvement and worsening. He opined that appellant had not reached maximum medical improvement and recommended a strengthening program for her right hand. On March 18, 2004, Dr. Ackerman began myofascial trigger point injection therapy. In subsequent notes, Dr. Ackerman reported that the injection therapy was going well and that appellant was attempting to increase her daily activities.

Appellant presented to Dr. John Lytle for an independent medical evaluation on January 26, 2005. He opined that the course of treatment was appropriate. He diagnosed appellant with:

Neuropathic pain to the RUE; weakness of the RUE NOS; pain in the LUE; weakness of the LUE; s/p carpal tunnel release bilaterally; cubital tunnel syndrome bilaterally with surgery on the L. She is postop spinal cord stimulator for pain control.

All of these problems that seem to have evolved over time with Ms. Vaughan are related by her to her original problem as this developed while working in the bread store on 9/17/97. Without the rather constant and continuous medical involvement, it would be difficult to relate her current conditions to her seemingly benign injury at that time.

In response to other questions, Dr. Lytle wrote:

What would be a medically reasonable and necessary plan for future treatment? Indicate use of medication use in your answer.

Seeing how that she has just recently undergone surgery for revision of her implanted spinal cord stimulator, I think that it is reasonable to continue to support that implant as necessary, including future battery changes.

Medication seems to be stable. I would anticipate the continuous use of anti-inflammatory medicine and obviously the occasional and as needed use of narcotic pain medicine for which she seems to have become accustomed.

Does the injured worker need any additional diagnostic testing?

I see no reasonable diagnostic testing that would assist this woman in becoming pain-free and returning to her normal functional position in life.

Please state whether the effects of the injury will ever resolve?

No. I do not see any chance that this problem will resolve in her lifetime.

Is the injured employee able to work, and if so, in what capacity?

This is a most difficult question. I see no reason she could not do cognitive work and at this point some work with her L hand. I think the function use of her R hand is extremely limited, even from the seemingly benign activities such as answering the phone.

This is a most confounding and frankly bizarre progression of subjective symptoms without objective physical findings. This has escalated to the point now where she is truly a functional invalid. There are in my opinion significant psychological and physical dependencies on her treatment and medication at this point.

On April 4, 2005, Dr. Ackerman wrote that the stimulator was providing appellant significant pain relief in her hand. However, appellant started complaining of muscle spasms in her right trapezius muscle. He opined that repetitive injections could cause muscle trauma and that an RS muscle stimulator would cause less trauma. Dr. Ackerman concluded, "With her history of reflex sympathetic dystrophy and the fact that she may need further surgery, I would like to minimize any invasive procedures and proceed with a less invasive modality, such as the RS stimulator."

Appellant presented to Dr. Marcia Hixson on April 26, 2005. On that day, appellant indicated that injections given to her three months prior gave her relief, but that the pain had returned. Dr. Hixson diagnosed appellant with right cubital-tunnel syndrome and gave her a cortisone shot. She recommended right cubital-tunnel release surgery. Dr. Hixson noted no

change in appellant's condition in a June 29, 2005 follow-up visit.

Appellant contended before the ALJ that appellee terminated her temporary-total-disability benefits on or about May 5, 2005, and that she was still entitled to those benefits. She also claimed entitlement to the cubital-tunnel release and the elbow injections proposed by Dr. Hixson and to follow-up treatment for her RSD. The ALJ ruled that appellant was entitled to temporary-total-disability benefits from on or about May 5, 2005, to a date yet to be determined. The ALJ also found that appellant was entitled to the treatment proposed by Dr. Hixson and treatment for her RSD. On appeal, the Commission ruled that appellant was entitled to temporary-total-disability benefits only through June 15, 2005. In addition it found that appellant was entitled to treatment for RSD, but it reversed the ALJ's finding that appellant was entitled to a cubital-tunnel release, stating that appellant's cubital-tunnel syndrome was not causally connected to her compensable injury. Appellant appealed the Commission's finding as to her entitlement to total-temporary-disability benefits, and because the Commission relied on a medical record belonging to someone other than appellant, we reversed that decision and remanded for a full examination of the record. On remand, the Commission found that appellant failed to prove entitlement to temporary-total-disability benefits after January 26, 2005. In so finding, the Commission relied on Dr. Lytle's assessment that appellant could perform cognitive work, though functional use of her right hand was extremely limited. This second appeal followed.

Discussion

Appellant challenges the finding that she was no longer entitled to temporary-total-

disability benefits after January 26, 2005. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, this court must affirm the decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Temporary-total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Searcy Indus. Laundry, Inc. v. Ferren*, 92 Ark. App. 65, 211 S.W.3d 11 (2005). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit. *Id.* If the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id.* The determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.*

As her second point on appeal, appellant argues that the Commission erred in finding that she was at maximum medical improvement prior to June 15, 2005, the date the Commission found that she reached that point in its first opinion. She properly cites *Smith v.*

AJ&K Operating Co., 365 Ark. 229, 227 S.W.3d 899 (2006), for the proposition that the Commission did not have the power to vary the relief granted in the mandate. She also asserts that the Commission inherently found in its previous decision that she had not reached maximum medical improvement prior to June 15, 2005, and that the Commission was without power to find on remand that she reached maximum medical improvement prior to that date. Appellant is incorrect.

Appellees terminated appellant's temporary-total-disability payments on May 5, 2005, and at issue was appellant's entitlement to payments beyond that date. The Commission originally found that appellant was entitled to such benefits until June 15, 2005, but in doing so, they relied upon the medical record referring to another of Dr. Ackerman's patients. While the Commission substantially quoted Dr. Lytle's opinion when recounting the history of the case in its October 11, 2006 opinion, the only medical record discussed in its analysis was the June 15, 2005 record of a patient suffering from ankle pain. We wrote that the erroneous finding "[left] this court to speculate concerning what evidence the Commission intended to rely on when making its decision," requiring us to reverse and remand "for [the Commission's] full examination of the relevant evidence presented." *Vaughan*, 99 Ark. App. at 268, 259 S.W.3d at 470. We offered no opinion as to the end of appellant's healing period.

When we reversed the original order, the parties were restored to the position they were in prior to the order being entered. See *Lowe v. Morrison*, 270 Ark. 668, 606 S.W.2d 569 (1980); *Palmer v. Carden*, 239 Ark. 336, 389 S.W.2d 428 (1965). Therefore, the Commission was obligated to review the entire record and make new findings. The fact that the

Commission found that appellant's healing period ended on a date prior to one it previously stated evidences the Commission's failure to fully review the record in this case the first time, warranting reversal of the previous opinion. In short, the Commission was within its power to find that appellant reached maximum medical improvement before June 15, 2005.

Appellant argues that the Commission erred in relying on Dr. Lytle's report to find that she had reached maximum medical improvement. She argues that no doctor, including Dr. Lytle, has declared her to be at maximum medical improvement and that the Commission was incorrect in interpreting Dr. Lytle's opinion as such. She also relies on medical records from Dr. Hixson, which show that appellant was not working and still seeking treatment.

On January 26, 2005, Dr. Lytle stated that he knew of no diagnostic testing that would help appellant in returning to a pain-free life and doubted that appellant would ever lead a pain-free life. He could only recommend support for her implanted stimulator and continuous use of pain medication. Dr. Lytle stated that appellant would reach the point where she could possibly work with her left hand. This opinion is corroborated by appellant's hearing testimony that she felt her condition was good enough to obtain a commercial driver's license. It was the duty of the Commission to interpret all the testimony and medical evidence and to draw inferences from it. *See Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). Dr. Lytle's opinion provides a sufficient basis for finding that appellant had reached maximum medical improvement as of January 26, 2005.

Appellant relies on records from Drs. Ackerman and Hixson that postdate Dr. Lytle's examination. She asserts that these records show that she is still within her healing period.

Appellant's reasoning assumes that a claimant who is still seeking treatment is still within her healing period. However, the persistence of pain is not sufficient, in itself, to extend the healing period. See *Bray v. International Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006) (affirming when two doctors opined that they could do nothing more for the claimant's condition, despite the claimant presenting off-work slips for dates after the date in which the Commission found that the claimant reached the end of his healing period). We have affirmed cases where the Commission found that the claimant's healing period had ended despite the claimant seeking treatment when there was evidence that the claimant was not expected to improve in any significant amount in the future. See, e.g., *Ark. Highway and Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

Appellant also relies on Dr. Hixson's April 26, 2005 recommendation that she undergo a right cubital-tunnel release. However, the Commission found that appellant's right cubital-tunnel was unrelated to her compensable injury. She did not appeal from that finding. Therefore, Dr. Hixson's recommendation cannot form the basis for reversing the Commission's finding that appellant reached the end of her healing period with respect to her compensable injury no later than January 26, 2005.

It is unfortunate that appellant successfully appealed a finding that her healing period ended on June 15, 2005, just to have the Commission find that her healing period ended four and a half months prior to that date. This finding, however, is supported by substantial evidence. Therefore, we must affirm.

BIRD and GLOVER, JJ., agree.

