

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 13, 2015

CLAIM NO. 201101214

AMAZON.COM

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

JEANNIE COLVIN
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Amazon.com ("Amazon") appeals from the April 17, 2015, Opinion and Order ruling on Jeannie Colvin's ("Colvin") September 10, 2014, Motion to Reopen and the May 22, 2015, Opinion and Order on Reconsideration of Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). In the April 17, 2015, decision the ALJ awarded permanent total disability ("PTD") benefits and medical

benefits. On appeal, Amazon asserts the ALJ's finding Colvin is permanently totally disabled is not supported by substantial evidence.

The Form 101 alleges two injuries. Colvin alleged a left shoulder injury which was allegedly sustained on February 28, 2010, in the following manner: "While lifting cases of canned drinks, my left shoulder began hurting." Colvin also alleged an injury to her hands sustained on February 7, 2011, in the following manner: "While pushing a box cart, my hands started to swell." The claim was assigned to Hon. Jeannie Owen Miller, Administrative Law Judge ("ALJ Miller").

On January 22, 2013, Colvin filed a "Motion to Amend Form 101" to add a neck injury occurring on February 28, 2010, which was sustained by ALJ Miller.

The April 1, 2013, Opinion and Award of ALJ Miller awarded permanent partial disability ("PPD") benefits and medical benefits for work injuries to Colvin's left shoulder and neck. Regarding Colvin's alleged bilateral hand injury, ALJ Miller determined as follows: "There is an abundance of evidence that the work injury caused, at the least, an exacerbation of the plaintiff's bi-lateral carpal tunnel syndrome- although there is no present impairment for the arm/wrists condition." ALJ

Miller relied upon the opinions and 7% impairment rating of Dr. Warren Bilkey to determine Colvin is permanently partially disabled.

On September 10, 2014, Colvin filed a Motion to Reopen alleging that "[s]ince the time of the Award, Plaintiff states that her condition has worsened as she has now developed RSD secondary to her work injury which is causing her to have debilitating pain." She further alleged:

She is currently unable to work and has been placed off from work by her treating orthopedic surgeon, Dr. Sanjiv Mehta. We request this claim be reopened so that consideration can be given to awarding her 100% occupational disability.

The March 11, 2015, Benefit Review Conference order lists "change of condition under KRS 342.125" and "permanent total disability" as the contested issues. The parties stipulated Colvin's educational level is "9th - GED."

Colvin was deposed on December 8, 2014. She testified she was terminated from Amazon on August 19, 2013, because of her work restrictions. Thereafter, she did not seek employment because "[t]he doctors will not release

[her] to go back to work." Colvin testified regarding her current symptoms:

A: Well, I'm having muscle spasms now that I didn't have before.

Q: And describe for me where those are, okay.

A: Sometimes I have them in my neck; sometimes I have them in my shoulder. I've had them in my elbow; I've had them in my hand, but there's been times that it has started at the top of my shoulder and I can feel it going all the way down to my hand.

Q: And you're pointing to your left shoulder and your left hand?

A: And my left hand. It stops in between my finger and my thumb.

Q: You mean your index finger and your thumb?

A: Yes.

Q: And when you say spasm, is that where the muscle like - are you describing like when the muscles are contracting, or what do you mean when you say spasm?

A: That muscle contracting, building knots.

Q: And when you have it, you say it goes all the way down, is it truly like the whole arm or does it start in one place and move down?

A: No, it starts at my shoulder and goes all the way down. It moves down. There had been a time that it had went

[sic] all the way down and went all the way back up to my shoulder.

Q: Now had you had any symptoms like that before 2013?

A: If I did it hadn't been very much on the muscle spasms.

Q: Okay.

A: Not that I can remember.

Q: What about other symptoms that you have going on?

A: It still hurts. My hand still sometimes goes numb; my elbow, I mean it still hurts.

Q: When you say it hurts and you have pain, where are you talking about; where is it?

A: I still have pain in my neck, top of my shoulders, my elbow, my muscle in the top of my arm.

Q: And you're pointing at the left side of your neck, your left shoulder?

A: Yes.

Q: The judge can't see what you're pointing at.

A: I'm sorry.

Q: That's okay. I'm just making sure we're getting it down.

A: And it still goes all the way down to my hands.

Q: Okay, and you said that you have numbness in your hand, is that what you said?

A: Yes.

Q: Is it the whole hand or just part of your hand?

A: Sometimes it's the whole hand.

Q: If it's not the whole hand, which part is it; is it certain fingers?

A: Yeah, it's usually my thumb and my finger, my first finger? [sic]

Q: You're pointing at your index finger?

A: Yeah.

Q: Okay.

A: And my wrist.

Q: And you had mentioned earlier that Ms. McKenna prescribed something for you because you get headaches sometimes?

A: Yes, and a lot of that is due to when my neck is bothering me and sometimes it sends whatever up to my head. Sometimes I have sharp pains going to the back of my head.

Q: That was going to be my next question. When you get a headache, what part of your head are we talking about where the headache is?

A: It usually starts back here at the base of my head and goes up.

Q: Is it more toward the left side?

A: Yeah, more toward the left side over here.

Q: Okay.

A: Because there's times when I move my head I can't move my neck around. It feels like it's got a catch or whatever in it.

Q: And I know you said you have pain. People describe pain different ways, right; is it achy or like dull or burning; how would you describe the pain that you have in your neck and shoulder?

A: Sometimes it's achy and sometimes it's shooting pain. It aches. I can't say it burns; it don't [sic].

Q: Do you ever have days that you don't have any pain?

A: There's never a day that I don't have pain, but there are some days that it doesn't bother me as bad.

Q: Do you have better days than others?

A: Yes.

Q: When you're having a good day, okay, so think about the least pain that you would have; you know, sometimes the doctor will say on a scale of one to ten how much pain do you have, right?

A: Uh-huh.

Q: All right, on a good day where you're having less pain, where would your pain fall?

A: It's usually about a three or a four.

Q: Now, if you're having a bad day where it's really severe?

A: Be about an eight to ten.

Q: How often do you think that you have a bad day where it's high like that?

A: If I do housework, then it's a bad day, a lot of times, especially if I'm using my left arm a lot.

Colvin was asked about her ability to return to work:

Q: Do you feel like you could go back to doing any kind of work or any or [sic] your past work right now?

A: I would love to.

Q: Physically do you think you can?

A: Probably not.

Q: And why?

A: Shoot, it hurts me to pack a 10-pound bag of potatoes; hurts me to mop my dag-gone floors.

Colvin was also asked about her change of symptoms since the April 1, 2013, Opinion and Order:

Q: Now, Ms. Colvin, your attorney had touched on this a little bit as far as the things that have changed about your condition since the judge's decision back in 2013.

A: Uh-huh.

Q: And you, from what I was understanding, you said that you were having more muscle spasms down your arm from your shoulder moving down into your fingers and if you had that before you didn't have it as much.

A: I don't remember if I've had muscle spasms. If I did, it hadn't been very much at all.

Q: And then you had gone through the areas where you were still having pain and headaches and everything else. Other than the increase in the muscle spasms, is there anything else that has changed about your condition since the judge's opinion?

A: The things that I do, that I can do more around the house, seems like it's getting to where I can't do much of them.

Q: Okay.

A: You know, like mopping the floors or-

Q: As far as your physical symptoms, are there any things that have changed other than the increase in the spasms?

A: Seems like I hurt more.

Q: Okay.

A: Seems like I have more frequent headaches.

Q: Okay. Do those headaches seemed to have been more frequent in response to anything? I know you said that the, where you said that the physical therapy kinda spring up-

A: Yeah.

Q: Did the increase in the headaches, does that seem to be in response to anything in particular?

A: When I use my arm more than what I normally do.

Q: Okay. Now you were talking about cleaning things around the house, about mopping the floors and folding sheets, and you had referenced cleaning the house from top to bottom, and I know this probably sounds like a stupid question, but when you're talking about cleaning the house from top to bottom, are you talking about literally like wiping down the walls and cleaning the windows and that kind of thing or what are we talking about?

A: Well, like cleaning windows and cleaning ceiling fans, cleaning out the cabinets, closets.

...

Q: Now as far as you were talking about the muscle spasms and you were talking about the knots-

A: Uh-hum.

Q: -are the knots, is that something that you had before the judge's decision, not before your work injury, but before the judge's decision?

A: I've had this knot, yes, that I have on my-

Q: When you say this knot, you're showing me right about the bend in your elbow?

A: In my muscle, the muscle at the top of my arm. Sometimes the knot at the top of my arm pops up and sometimes it goes all the way across.

Q: Okay.

A: Now that one I've had. Now these up here on my neck.

Q: You didn't have the ones in your neck and shoulder?

A: I didn't know I had them.

Q: Okay. Now as far as that left arm is concerned, is it extremely sensitive to touch?

A: Sometimes maybe, but-

Q: I mean, it's not like it hurts to just touch it?

A: No; no. Not my arm, but sometimes up here at the base of my neck and the top of my shoulder, yes.

Q: And that's I guess if you're having neck and muscle spasm or something like that?

A: Yeah.

Q: The skin doesn't hurt to touch?

A: No.

Q: And the skin on your arm doesn't hurt to touch it?

A: No.

Q: Do you have any strange, and I understand when you take a compression sleeve off your arm is going to look a little funny, but other than that, do you have discoloration in your arm?

A: Not that I have noticed.

Q: Okay.

A: But then again I haven't really paid no [sic] attention to that.

Q: It doesn't look outstandingly weird to you?

A: No.

Q: Okay, not, gee, why is my arm discolored or anything like that?

A: No.

Q: Does it have any odd hair growth or anything like that?

A: No.

Q: Do you notice it- and also I realize that the compression sleeve can affect this, so let's say- you don't sleep in the compression sleeve?

A: No.

Q: At night do you notice that your arm is excessively warm or excessively cool, like cooler than the rest of your body?

A: I haven't really paid any attention to it.

Q: You haven't noticed that your arm is just like freezing or anything?

A: No.

Q: Okay. Do you have like excessive sweating on that arm as opposed to the rest of your body?

A: No.

Q: Not related to the compression sleeve; just all by itself?

A: No.

Q: Okay. And other than the increase in the muscle spasms down your neck and down your left arm and some increase in the amount of pain, you haven't noticed any real difference in your symptoms since the judge's decision?

A: Other than it hurts me more and the swelling may be more.

Q: Did you have the swelling before?

A: Yeah, but it seems like it swells more.

Colvin testified at the March 25, 2015, hearing that she has not worked since her termination from Amazon. For her work-related injuries, she was taking Neurontin, Diclofenac, Tramadol, Elavil, and Baclofen. Concerning her current symptoms she testified:

A: My neck still hurts, my shoulder, my whole arm, my elbow, my hands.

Q: And, how does it feel? What does it feel like?

A: Sometimes I have sharp stabbing pains, I have muscle spasms. Sometimes, it get's [sic] tingly and numb.

Q: Now, you're- you're wearing a sleeve of some type today, did somebody recommend that for you?

A: Yes. Doctor Htin.

Q: Doctor Htin?

A: Uh-huh. (Yes)

Q: And, do you use it on a regular basis?

A: Yes. I have to wear it every single day.

Q: And, does it help?

A: To some extent, maybe. It's supposed to help with the swelling.

...

A: But, a lot of times, when I take it off, it seems like it's swelled still the same.

Q: These- you know, you talked about all these medicines you're taking. Do you have any side effects from those medications or are you tolerating them pretty well?

A: Most- most part, I'm okay with them.

Q: Okay. Now, here's the next thing I want to know, this problem that you're having with your arm, is- is it the same every day or does it vary from day-to-day?

A: It varies from day-to-day.

Q: Can you explain that for me, please?

A: Like, there's- I have good days where I don't have it hurt as bad. I have bad days. And, then I have severe bad days.

Q: Okay. Well, let me ask you this, do you ever have days that you're pain free?

A: No.

Q: Now, I-I don't like using the number pain scale, but I don't know how much other way to talk about it. But, if you're having a good day, you know, zero's no pain and ten you're heading for the emergency room. If you're having a good day, about where is your pain level?

A: About a four.

Q: Okay. And, if you're having a- a- an ordinary day?

A: About a seven or an eight.

Q: Now, you said you have bad days and you have really bad days?

A: Yes.

Q: What's the bad days?

A: It's about an eight.

Q: And, then the really bad days is-

A: Is- I'd go on up to fifteen.

Q: Okay. All right. Really bad?

A: Very bad.

Q: Okay. Now, here's the next thing I need to know. I need to know how often you're having those kind of days, particularly the bad ones. Are they, you know- like, how many days a week or per month or how often are you having those really bad days?

A: The bad days usually every other day, maybe.

Colvin introduced several medical records of Dr. Sanjiv Mehta. The medical record dated March 21, 2014, states that Colvin was there for a second opinion. After performing an examination, Dr. Mehta set forth the following diagnoses:

- 1) Degenerative disc disease C3-4.
- 2) Mild carpal tunnel syndrome, left.
- 3) Partial thickness rotator cuff tear, left shoulder.
- 4) AC joint arthritis, mild, left.
- 5) Left upper extremity complex regional pain syndrome.

Under "plan" is the following:

- 1) Extensive discussion with the patient and her family today. I do not have any surgical options for this patient.
- 2) My recommendations would be for her to continue to rehabilitate the shoulder and upper extremity with aggressive physical therapy and stretching and strengthening exercises.
- 3) One offer that I can make to the patient is to schedule her to see Dr. Verghis for stellate ganglion block. I do feel that a stellate ganglion block will help this lady both for therapeutic and diagnostic purpose. She understands and accepts that situation.
- 4) Eventually she may have to seek disability process because I do not feel like she will be able to go back to work with the current clinical

complex. Patient understands and accepts those options.

5) RTO 2 months after her stellate ganglion block.

6) There is no indication for surgical release of the carpal tunnel at this point because she does not have any changes consistent with demyelination of the nerve.

7) Discussed with patient about using Vitamin B6 & B12 100 micrograms one po q-day.

8) Home exercise program for the shoulder and cervical spine.

9) Use a splint for the upper extremity dysfunction.

10) No narcotics prescribed to the patient. As a matter of fact, I would recommend to the patient to stay away from narcotics to minimize the possibility of physiological and psychological dependence and abuse. She understands and accepts that as well.

Dr. Mehta's June 20, 2014, record contains the following diagnosis: "Chronic left upper extremity pain following upper extremity injury with radiculopathy with RSD with complex regional pain syndrome." Under "plan" is the following:

1) Aggressive range of motion.

2) Stretching and strengthening exercises.

3) She is getting prescriptions from the pain clinic.

4) She is on diclofenac 75 mg one po b.i.d.; Neurontin 300 mg one po q-day; Flexeril 10 mg one po b.i.d. and Tramadol 15 mg one po q-6.

5) Ibuprofen for pain and discomfort.

6) Reinjury precautions.

7) RTO 3 months.

8) I have discussed with patient about talking to her attorney about the disability process.

Dr. Mehta's September 19, 2014, record indicates Colvin was experiencing left shoulder and upper extremity pain. Dr. Mehta diagnosed the following: "Left shoulder injury with left upper extremity radiculopathy with subacromial bursitis of left shoulder." Under "plan," Dr. Mehta wrote as follows:

1) Gentle active mobilization.

2) Stretching and strengthening exercises.

3) Ibuprofen 600 mg on po b.i.d. for pain and discomfort.

4) Will write her a note for PT to actively mobilize the left upper extremity.

5) She is off work at this point.

6) RTO 3 months.

Colvin introduced the February 3, 2015, Independent Medical Examination ("IME") report of Dr.

Bilkey. Dr. Bilkey noted he previously performed an IME on September 20, 2011. After performing an examination, Dr. Bilkey set forth the following impression:

2/28/10 work injury cervical strain, left shoulder strain, myofascial pain involving scapular musculature bilaterally. Ms. Colvin has been diagnosed with RSD/CRPS. She has acquired chronic pain affecting the neck, left upper extremity, with headaches.

Dr. Bilkey opined as follows:

Since the IME of 9/20/11, Ms. Colvin has continued treatment. She has been diagnosed with RSD/CRPS. She has not had any improvements with treatment. Treatment has included stellate ganglion block. Physical exam shows no trophic change and there have been no CRPS/RSD related diagnostic tests performed for Ms. Colvin. She appears to have worsened symptomatically with less left competence compared to the original assessment of 9/20/11. There is pain with strength testing now. She has been given a diagnosis of CRPS/RSD. Since the IME of 9/20/11, Ms. Colvin returned to work. She failed this however and has not been able to continue with work activities.

In my opinion the above diagnoses are due to the 2/28/10 work injury. It appears that the 2/7/11 injury was an exacerbation of the original problem. The evaluation and treatment procedures that Ms. Colvin has had appear to have been reasonable, medically necessary, and work injury related. There is no evidence here that Ms. Colvin had an active pre-existing impairment

affecting her injury sites prior to 2/28/10.

Ms. Colvin appears to be at MMI.

...

Activity restriction recommendations are that Ms. Colvin be limited to a sedentary level of activity. These restrictions are due to the 2/28/10 work injury and preclude Ms. Colvin from being able to resume the full scope of the usual work duties successfully carried out prior to the 2/28/10 work injury.

Dr. Bilkey provided his calculation of Colvin's impairment rating:

A permanent partial impairment rating is calculated based upon today's evaluation. According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, impairment for loss of left shoulder active range of motion is referenced on Fig. 16-40 in the AMA Guides, Fifth Edition. For loss of flexion and extension each there is 1% upper limb impairment. This yields 2% upper extremity impairment. This converts to 1% whole person impairment. For the cervical strain diagnosis and as noted in the prior IME report, Ms. Colvin has 7% whole person impairment with her condition being a Cervical DRE Category II impairment as referenced on Table 15-5. Finally for chronic pain, taking into account the diagnosis of CRPS/RSD there is 3% whole person impairment as referenced on Fig. 18.1 in the Chapter on Chronic Pain. this is a case where an impairment rating for CRPS/RSD is not carried out according to the rules of the Guides because Ms. Colvin does not satisfy the

8 of 11 required criteria for the diagnosis. (If it is to be judged as a case of CRPS/RSD, using Table 16-10, Ms. Colvin has 30% upper extremity impairment.)

Combining the impairment for loss of left shoulder active range of motion, chronic pain, and cervical strain yields a total impairment of 11% whole person impairment. The entirety of this 11% whole person impairment is attributable to the 2/28/10 work injury. This impairment rating is higher than the impairment rating which was issued in the IME report of 9/20/11 and takes into account further loss of shoulder active range of motion and chronic pain related to CRPS/RSD. This impairment rating replaces the impairment rating that was issued on 9/20/11.

In the April 17, 2015, decision, the ALJ set forth the following findings of fact and conclusions of law:

A. Change of condition under KRS 342.125; permanent total disability.

"Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order [for] . . . [c]hange of disability as *shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.*" KRS 342.125(1)(d) (emphasis added).

As the fact finder, the ALJ has the sole authority to determine the weight, credibility, substance and

inferences to be drawn from the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The ALJ also has the sole authority to judge the weight to be afforded to the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). When conflicting evidence is presented, the ALJ may choose whom or what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977). Furthermore, 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, 96 (Ky. 2000).

I saw and heard the plaintiff Ms. Colvin testify at the Hearing. I sat a short distance from her and carefully observed her facial expressions during her testimony, carefully listened to her voice tones during her testimony, and carefully observed her body language during her testimony. Both attorneys examined her at the Hearing. I am the only decision maker who actually saw and heard her testify. She was a stoic individual. I make the determination that she was a credible and convincing lay witness and that her testimony rang true.

This case calls to mind the Opinion of the Kentucky Court of Appeals in *Jeffries v. Clark & Ward*, 2007 WL 2343805 (Ky.App.2007), where the Court of Appeals quoted from Chief Judge Overfield's Opinion in the case, in which he made the following statement . . . "It is often difficult to explain to litigants and counsel why one witness is considered credible and

another is not considered credible. No doubt many of the factors related to the credibility by a trier of fact are subconscious and many are related to life experiences" (emphasis supplied). The Court of Appeals stated that it was within the Judge's sole discretion to determine the quality, character, and substance of the evidence, and the Court of Appeals did not disturb Judge Overfield's determination that one witness was not credible, despite the fact that Judge Overfield used his "life experiences" in making that determination.

In this case, I make the determination that the medical evidence from the plaintiff's treating orthopedic surgeon, Dr. Mehta, as covered above, was very persuasive, compelling and reliable. I also make the determination that the medical evidence from Dr. Bilkey, the examining physician, was very persuasive, compelling and reliable. The medical evidence from Dr. Bilkey is covered in detail hereinabove.

In *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979), the Kentucky Supreme Court stated that what it had in that case was lay testimony descriptive of and supportive of a permanent disability, together with medical testimony that was not in conflict with the lay testimony. The high court stated that where the medical evidence clearly and unequivocally shows the actual body condition, then the lay testimony is competent on the question of the extent of disability which has resulted from the bodily condition. The high court further stated that where there is medical testimony from which the decision maker could have concluded that the plaintiff did suffer from a

work-related trauma, then, having reached that conclusion, the decision maker could then use the lay testimony to determine the extent, if any, of the occupational disability.

In rendering a decision, KRS 342.285 grants the Administrative Law Judge as fact-finder the sole discretion to determine the quality, character, and substance of evidence. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

“‘Permanent total disability’ means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury” Kentucky Revised Statutes (KRS) 341.0011. To determine if an injured employee is permanently totally disabled, an ALJ must consider what impact the employee’s post-injury physical, emotional, and intellectual state has on the employee’s ability “to find work consistently under normal employment conditions [and] to work dependably[.]” *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000). In making that determination,

“the ALJ must necessarily consider the workers’ medical condition [however,] the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. a worker’s testimony is competent evidence of his physical condition and of his ability to perform various

activities both before and after being injured."

Id. at 52. (Internal citations omitted.) See also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979).

As noted above, the diagnoses of Dr. Mehta, the plaintiff's treating orthopedic surgeon, were that Ms. Colvin had chronic left upper extremity pain following upper extremity injury with radiculopathy with reflex sympathetic dystrophy with complex regional pain syndrome. Dr. Mehta prescribed for Ms. Colvin appropriate conservative treatment. As noted above, Dr. Bilkey's diagnoses were cervical strain, left shoulder strain, myofascial pain involving scapular musculature bilaterally, reflex sympathetic dystrophy/complex regional pain syndrome and acquired chronic pain affecting her neck and left upper extremity, with headaches. Dr. Bilkey stated that Ms. Colvin was at maximum medical improvement and that she had worsened symptomatically as compared to his original examination of September 20, 2011. Dr. Bilkey noted that Ms. Colvin had not been able to continue with her work activities. Dr. Bilkey stated that under the AMA Guides, Fifth Edition, Ms. Colvin will have an 11% permanent whole person impairment.

Ms. Colvin is now 45 years old, meaning that she is in middle-age. The record shows that she had a good work history from 1996 to 2011. She worked at a number of physical labor jobs. Her work history leads me to make the determination that she had a good work ethic before her injuries while employed by Amazon. Her serious and permanent injuries, as diagnosed by Dr.

Mehta, her treating orthopedic surgeon, and by Dr. Bilkey, the examining physician, constitute very significant limitations for reemployment in the highly competitive job market. I make the determination that if Ms. Colvin goes out into the highly competitive job market she will have an extremely difficult time finding any regular gainful employment. I make the determination that she will not be able to return to any regular gainful employment in the highly competitive job market.

Considering the severity of the plaintiff's work-related injuries, her work history, her GED educational level, her credible and convincing lay testimony, as covered above, and the persuasive, compelling and reliable medical evidence from both Dr. Mehta and Dr. Bilkey, I make the determination that Ms. Colvin cannot find work consistently under regular work circumstances and work dependably. Based upon all of the above factors, I reach the legal conclusion that Ms. Colvin's physical condition has greatly worsened and that she is permanently and totally disabled.

I reach the legal conclusion that Ms. Colvin is permanently and totally disabled as a result of her work injuries on February 28, 2010.

In its petition for reconsideration, Amazon argued the evidence does not support an increase in impairment justifying an award of permanent total disability.

While most of the fifteen pages of the May 22, 2015, Opinion and Order on Reconsideration contain verbatim repetition of the April 17, 2015, Opinion and Order, the ALJ provided additional analysis and determinations:

- A recent decision of the Kentucky Supreme Court in *City of Ashland v. Stumbo*, 2015 WL 2340403 (Ky.) applies to the case at bar. There, the court ruled that the Judge is required to undertake a five-step analysis in order to determine whether the plaintiff was totally disabled. (1) Based upon the evidence reviewed hereinabove, I make the determination that Ms. Colvin sustained work-related injuries to her neck and left upper extremity, chronic in nature, including radiculopathy, pain, headaches and reflex sympathetic dystrophy/complex regional pain syndrome, as shown in the persuasive, compelling and reliable medical evidence from both Dr. Mehta and Dr. Bilkey. (2) I next make the determination pursuant to the persuasive, compelling and reliable medical evidence from Dr. Bilkey, that the plaintiff is at maximum medical improvement and that under the AMA Guides, Fifth Edition, will have an 11% whole person permanent impairment attributable to her February 28, 2010 work injuries. (3) I next make the determination that the plaintiff has a permanent disability as proven by both the plaintiff's credible and convincing lay testimony and the persuasive, compelling and reliable medical evidence from both Dr. Mehta and Dr. Bilkey. Dr. Mehta's final diagnoses were chronic left upper extremity pain following upper extremity injury with radiculopathy and reflex sympathetic dystrophy/complex regional pain

syndrome. Dr. Bilkey's final diagnoses were work-related injuries to the plaintiff's cervical spine, a left shoulder strain, myofascial pain involving scapular musculature bilaterally and RSD/ CRPS, as well as chronic pain affecting the neck and left upper extremity with headaches. (4) I next make the determination that Ms. Colvin is unable to perform any type of work, basing that determination upon her credible and convincing lay testimony and the persuasive, compelling and reliable medical evidence from both Dr. Mehta, the treating physician, and Dr. Bilkey, the examining physician, as summarized hereinabove. Ms. Colvin is now 45 years old, meaning that she is now in middle age. The record confirms that she had a good work history from 1996 to 2011. She worked at a number of physical labor jobs. Her solid work history leads me to make the determination that she had a good work ethic before her injuries while employed by Amazon. I make the determination that if she could work, she would be working. I make the determination that her serious and permanent injuries, as recounted by both Dr. Mehta, her treating orthopedic surgeon, and by Dr. Bilkey, the examining physician, constitute very significant limitations for reemployment in the highly competitive job market. I make the determination that if Ms. Colvin goes out into the highly competitive job market to seek a job, she will have an extremely difficult, and probably impossible, time finding any regular gainful employment. I make the determination that she will not be able to return to any regular gainful employment in the highly competitive job market. (5) I make the determination that Ms. Colvin's total disability is the result

of her work-related injuries, consisting of chronic left upper extremity pain following an upper extremity injury with radiculopathy with reflex sympathetic dystrophy/complex regional pain syndrome and/or cervical strain, left shoulder strain, myofascial pain involving scapular musculature bilaterally and chronic pain affecting her neck and left upper extremity with headaches, all of which she sustained on or about February 28, 2010. As the concurring opinion in the *Stumbo* case stated, each case clearly requires an individualized determination of what a worker can and cannot do, and the plaintiff can certainly know as a fact that she is in pain, and she well knows when it hurts to perform certain physical activities. As the concurrent opinion further stated, the plaintiff is entitled to tell and the court will give credence and weight to her testimony. The concurring opinion in *Stumbo* further stated that a finding of permanent total disability does not require that the plaintiff be homebound. That is certainly borne out by the medical and lay evidence in this case.

- In making the above determinations, I rely upon the unanimous Opinion of the Supreme Court of Kentucky in *Wilder v. Enterprise Mining*, 2014 WL 7239812 (Ky. 2014). There, the Supreme Court ruled that (1) the ALJ has the sole authority to determine the weight, credibility, substance and inference to be drawn from the evidence; (2) where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination; (3) although a party may note evidence

which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal; (4) the ALJ is free to interpret the expert evidence and reach conclusions; (5) while evidence has been presented to counter the ALJ's conclusion, the mere fact that contrary evidence could lead to a different result does not provide grounds to reverse the ALJ.

On appeal, Amazon argues the ALJ's finding of permanent total disability is not supported by substantial evidence. We disagree and affirm.

As an initial matter, we note the increase in impairment rating for loss of flexion and extension as well as for pain set forth in Dr. Bilkey's February 3, 2015, IME report is *prima facie* evidence of a worsening of condition. The issue, then, is whether there was a worsening of Colvin's permanent partial disability or Colvin is permanently totally disabled. The ALJ determined Colvin's physical condition has greatly worsened and she is now permanently totally disabled. It is clear from the language in the April 17, 2015, Opinion and Order and the May 22, 2015, Opinion and Order on Reconsideration that the ALJ relied upon the opinions of Drs. Bilkey and Mehta, sufficiently summarized in the April 17, 2015, Opinion and Order and the May 22, 2015, Opinion and Order on Reconsideration, to support his determination. As noted,

Dr. Bilkey assessed an additional 2% upper extremity impairment which converted to 1% whole person impairment. He also assessed a 3% whole person impairment for pain. This yields a total whole person impairment rating of 11% as compared to the 7% previously assessed by Dr. Bilkey. In addition, Dr. Bilkey opined as follows:

Activity restriction recommendations are that Ms. Colvin be limited to a sedentary level of activity. These restrictions are due to the 2/28/10 work injury and preclude Ms. Colvin from being able to resume the full scope of the usual work duties successfully carried out prior to the 2/28/10 work injury.

Significant in the case *sub judice* is the fact ALJ Miller relied upon Dr. Bilkey in rendering her decision. As also previously noted, Dr. Mehta, in his March 21, 2014, medical record, stated as follows: "Eventually she may have to seek disability process because I do not feel like she will be able to go back to work with the current clinical complex."

This medical evidence, standing alone, comprises substantial evidence in support of the ALJ's determination Colvin's condition has worsened since ALJ Miller's April 1, 2013, Opinion and Award and she is now permanently totally disabled. However, the ALJ also found Colvin's testimony to

be credible and convincing, and Colvin testified she is unable to return to work. The ALJ may rely upon Colvin's testimony in making the determination that her condition has worsened and she is now permanently and totally disabled. See Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). As this determination is supported by substantial evidence in the record, it will not be disturbed.

The April 17, 2015, Opinion and Order and the May 22, 2015, Opinion and Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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