OPINION ENTERED: October 26, 2012

CLAIM NO. 201073116

APRIL MCKINNEY PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

BULLITT COUNTY VETERINARY
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. April McKinney ("McKinney") seeks review of the decision rendered July 20, 2012 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for

injuries she sustained on October 29, 2010 while working for the Bullitt County Veterinary Center, Inc. ("Bullitt"). McKinney also appeals from the order entered August 14, 2012 denying her petition for reconsideration.

On appeal, McKinney argues the ALJ abused his discretion as a fact-finder by only awarding TTD benefits through August 19, 2011, when Dr. Tsu-Min Tsai, her treating hand surgeon, assessed a functional impairment rating and released her to return to work based solely upon her hand condition. McKinney also argues the ALJ failed to consider she continued to require treatment for her left shoulder and neck, and the award of TTD benefits should have continued until a later date when she achieved maximum medical improvement ("MMI") for those conditions. We disagree and affirm.

McKinney testified by deposition on June 21, 2011, and again at the hearing held August 18, 2011. McKinney, a resident of Meade County, Kentucky, was born on March 28, 1978, and is a high school graduate who completed some college coursework. McKinney's work history includes work in fast food restaurants, as a daycare provider, a receptionist, and at the time of the accident, as a veterinary technician.

On October 29, 2010, McKinney was assisting in preparing a German Shepherd for surgery. As McKinney wrapped her left arm over the dog, it bolted, causing her left arm to jerk resulting in numbness to her left hand. She immediately reported this injury to the veterinarian she was assisting, then the office manager. She was taken to the Immediate Care Center, and subsequently underwent physical therapy which provided no relief. She was then referred to Dr. Tsai with Louisville Hand Surgery. Dr. Tsai administered injections on multiple occasions which provided only temporary relief. Dr. Tsai eventually performed surgery on both her left wrist and left elbow. She stated the surgeries provided little, if any, relief.

McKinney last saw Dr. Tsai in August 2011 when he assigned an impairment rating, and allowed her to return to work with no restrictions due to her left hand condition. McKinney stated she continues to have difficulty holding items in her left hand due to her fingers locking. She also continues to experience pain in her left shoulder and neck, as well as headaches and numbness from her fingers into the back of her head. Treatment for her left shoulder and neck has consisted of medication and injections which she claims has not abated her condition.

McKinney filed a Form 101 on December 16, 2011, alleging injuries to her left hand, left wrist, left shoulder and neck resulting from the October 29, 2010 work injury. In support of her claim she filed treatment records from Dr. Tsai describing complaints in her left hand, including numbness and pain. In those notes, Dr. Tsai outlined treatment provided and the surgeries he recommended.

McKinney subsequently filed Dr. Tsai's treatment records from November 2010 through his final note dated August 19, 2011. When Dr. Tsai first saw McKinney, he placed her on alternative duty with no use of her left arm. On December 22, 2012, he interpreted an EMG/nerve conduction study as, "essentially normal study with no supportive evidence for median, ulnar, or superficial radial nerve neuropathy on the left side." Dr. Tsai later diagnosed carpal tunnel syndrome, cubital tunnel syndrome, trigger thumb, and de Quervain's. He subsequently performed carpal tunnel, cubital tunnel and pronator teres releases. On August 11, 2011, Dr. Tsai released her to return to light duty. On August 19, 2011, Dr. Tsai assessed a 6% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA

Guides”), and released her to return to regular work. He also discharged her as a patient at that time.

McKinney also filed the records of Dr. Edward Tillett, an orthopedic surgeon from Louisville dated July 25, 2011, August 15, 2011, August 25, 2011, and September 22, 2011. Dr. Tillett stated she had full range of motion of the neck, and nearly full range of motion of the left shoulder. In July 2011, Dr. Tillett noted McKinney appeared to have rotator cuff tendinitis and subachromial bursitis of the left shoulder. He then administered an injection to the left shoulder. The August 15, 2011 note indicates an MRI had been performed which did not demonstrate evidence of a rotator cuff or labral tear. He noted some narrowing of the acromioclavicular joint. On August 25, 2011, Dr. Tillett noted the injection did not ease her symptoms. He stated, “most likely, she has symptomatic left acromioclavicular joint arthritis.” On September 22, 2011, Dr. Tillett diagnosed left shoulder acromioclavicular arthritis, and left cervical muscle strain. He administered an additional injection to the left shoulder and recommended a cervical MRI. Dr. Tillett did not impose any restrictions upon McKinney’s activities, nor did he take her off work.

McKinney filed records from Hardin Memorial Hospital for treatment of head and neck pain on November 9

and 10, 2011. These records do not reflect McKinney was taken off work, or that any restrictions were imposed upon her activities.

McKinney filed the records from Jewish Hospital regarding the surgery performed on March 4, 2011. The operative note reflects she underwent a left FCR decompression, left radial carpal tunnel release, and a left cubital tunnel release.

Finally, McKinney filed the report of Dr. Jules Barefoot who evaluated her on February 1, 2011. Dr. Barefoot noted the history of carpal and cubital tunnel releases, as well as the history of the work injury. Dr. Barefoot stated McKinney was status post left carpal and cubital tunnel release. He also noted a labral tear and left shoulder AC joint osteoarthritis. Dr. Barefoot found her to have reached MMI, and assessed a 6% impairment rating pursuant to the AMA Guides. He recommended orthopedic follow-up for the left shoulder. Dr. Barefoot did not outline any specific restrictions, however he opined it would appear she is precluded from returning to her previous job as a veterinary assistant.

Dr. Michael Moskal, an orthopedic surgeon from Sellersburg, Indiana, evaluated McKinney at Bullitt's request on November 22, 2011. Dr. Moskal opined her pain

was “not correlated by anatomy or physiology”. He further opined she sustained no injury, stating, “[t]here is not an anatomical condition or physiological process producing impairment.” Dr. Moskal would not impose restrictions on her activities, and he believed her past treatment has been and continues to be unreasonable and unnecessary. He noted her thumb tingling and numbness did not develop until three or four weeks after the accident.

Attached with Dr. Moskal’s report was the November 21, 2011 independent radiologic evaluation performed by Dr. Mitchell Kline, a radiologist. Dr. Kline reviewed the MRI performed on August 11 2011, and interpreted it as demonstrating normal rotator cuff and tissue; displaced defect of the posteriosuperior quadrant of the glenoid labrum; the remainder of the glenohumeral joint was normal; and, the acromioclavicular joint was normal.

Dr. Ellen Ballard evaluated McKinney at Bullitt’s request on January 31, 2011. She noted McKinney takes occasional Flexeril and Hydrocodone. Dr. Ballard noted the history of injury, injections, medication, testing and surgery. Dr. Ballard noted normal cervical and shoulder range of motion, but McKinney reported she felt a popping sensation in the left shoulder. McKinney also reported pain over the left elbow, the dorsum of the left hand, and the

first web space in the left hand. Dr. Ballard opined McKinney had sustained a possible traction injury to her left arm. She noted the only objective abnormality was discoloration at the site where injections were administered. Dr. Ballard recommended temporary restrictions of no overhead work and a ten pound lifting restriction for the left arm, and no lifting over thirty pounds. She estimated McKinney would reach MMI in three to four weeks, at which time she could return to full duty. Dr. Ballard assessed a 0% impairment rating based upon the AMA Guides.

In the decision rendered July 20, 2012, the ALJ found, in part, as follows:

> 13. As the Plaintiff's treating physician, the ALJ finds Dr. Tsai's opinion to be the most credible and convincing regarding the impairment of the Plaintiff. Dr. Tsai treated the Plaintiff conservatively using multiple injections before suggesting and performing a left carpal tunnel and cubital tunnel release. He noted thereafter that the Plaintiff suffered from reduced grip strength in the left hand. Dr. Tsai assessed a 6% whole person impairment.
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> 14. Dr. Barefoot, after reviewing all of the Plaintiff's treatment records, likewise assessed the Plaintiff at a 6% whole person impairment related to the work injury and concluded that the Plaintiff would continue to have problems with diminished grip strength

in her left hand. This consensus of impairment ratings has convinced the ALJ.

15. Dr. Tsai's opinion regarding the Plaintiff's return to work is also convincing. He concluded that she had full motion with some residual discomfort and weakness but released the Plaintiff to return to regular work on August 19, 2011. The ALJ therefore finds that the Plaintiff retains the ability to perform the type of work being performed at the time of the injury and thus the "3" multiplier is not applicable.

Temporary Total Disability

16. The ALJ finds per Dr. Tsai's determination that the Plaintiff could return to regular work on August 19, 2011, that the Plaintiff reached maximum medical improvement as of that date and therefore the Defendant is entitled to a credit for overpaid TTD benefits.

Compensability of Cervical MRI and DeQuervians[sic] Release

17. Pursuant to KRS 342.020 in relevant part, the employer shall pay for the cure and relief from the effects of an injury or occupational disease, all medical, surgical, hospital treatment, including nursing, medical and surgical supplies and appliances as may be reasonably required at the time of the injury and thereafter during disability… Dr. Tsai began treating the Plaintiff after her initial injury and continued to see her and to document her consistent complaints of shoulder, wrist and neck pain which was not present prior to the work injury.

> 18. Dr. Tsai has treated the Plaintiff conservatively, performing multiple injections prior to determining the need for surgery. He has determined that she could benefit from a DeQuervian's [sic] release and as a result of the referral to Dr. Tillet, a cervical MRI has also been proposed. The need for both procedures is well-documented as the Plaintiff has repeatedly presented with consistent symptoms since the date of the work injury. The ALJ therefore finds both the DeQuervians[sic] release and the cervical MRI to be compensable.

In her petition for reconsideration, McKinney argued the ALJ erred in only awarding TTD benefits through August 19, 2011. McKinney argued she continued to treat with Dr. Tillett after her release by Dr. Tsai, and therefore had not reached MMI. The petition for reconsideration was denied by the ALJ in an order entered August 17, 2012.

As the claimant in a workers' compensation proceeding, McKinney had the burden of proving each of the essential elements of her cause of action including the appropriate period of TTD benefits. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since McKinney was unsuccessful before the ALJ, the question on appeal is whether the evidence compels a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence so overwhelming

no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

In rendering a decision, KRS 342.285 grants the ALJ 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). The 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). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

We cannot say the outcome arrived at by the ALJ in finding McKinney to be entitled to TTD benefits only through August 19, 2011, is so unreasonable based upon the evidence that it must be reversed as a matter of law.

KRS 342.0011(11)(a) defines TTD as follows:

> [T]he condition of an employee who has not reached maximum medical improvement 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 to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

> 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.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court further explained:

> "[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary or that she was performing at the time of his injury."

Id. at 659.

In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
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> Id. at 580-581.

Here, the ALJ found most persuasive Dr. Tsai's August 19, 2011 report assessing a functional impairment

rating, and releasing her to return to work without restrictions. While she continued to treat with Dr. Tillett thereafter, the records submitted do not indicate he restricted her activities in any way, or that he ever took her off work. Nothing in his records contradict the ALJ's decision limiting TTD benefits through August 19, 2011. Likewise, neither Dr. Ballard nor Dr. Barefoot provided opinions which would support an additional period of TTD benefits.

In the case *sub judice,* Dr. Tsai found McKinney had reached MMI and allowed her to return to work with no restrictions. The ALJ relied upon this in awarding TTD benefits. No evidence was submitted which would support entitlement to an additional period of TTD benefits. Therefore, the evidence does not compel a contrary result.

Accordingly, the decision rendered July 20, 2012, by Hon. Jonathan R. Weatherby, and the August 17, 2012 order overruling McKinney's petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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