Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 21, 2011

CLAIM NO. 200791020

BRITTHAVEN OF BENTON PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

VICKIE SMITH
and HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING IN PART, VACATING IN PART, AND REMANDING

* * * * * *

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

ALVEY, Chairman. Britthaven of Benton ("Britthaven") seeks review of the opinion, order and award rendered May 31, 2011 by Hon. Lawrence F. Smith, Administrative Law Judge ("ALJ"), awarding Vickie Smith ("Smith") permanent total disability benefits. Britthaven also appeals from the

order entered August 8, 2011 denying its petition for reconsideration.

Smith, a dietary aide for Britthaven, a nursing home located in Benton, Kentucky, slipped and fell on a wet floor on October 18, 2006 while exiting the kitchen at work. As a result of that accident, she alleged injuries to her neck, left shoulder, left upper arm, left anterior chest wall, left elbow and left wrist, as well as headaches. Smith subsequently amended her claim to include an allegation of psychological conditions stemming from her injuries. The ALJ found Smith to be totally occupationally disabled and awarded benefits accordingly. The ALJ also found Smith was entitled to medical benefits pursuant to KRS 342.020. Regarding the psychological injury, he found as follows: "the plaintiff did not sustain a psychological injury as defined by the Act. I further find that the defendant is not responsible for the expense of the plaintiff's psychological care."

On appeal, Britthaven argues the ALJ erred in finding Smith to be totally disabled and disregarded undisputed medical evidence. We disagree with the arguments made by Britthaven and find the ALJ's decision is supported by substantial evidence. We affirm in part, vacate in part, and remand.

Smith testified by deposition on June 23, 2010, and at the hearing held on March 29, 2011. Smith was born on November 24, 1954 and is a resident of Benton, Kentucky. She is a high school graduate with some college course work. She testified she sustained work-related injuries on October 18, 2006 while working for Britthaven. Prior to her work with Britthaven, Smith worked cleaning houseboats, as a maid at a hotel, performing lawn work, as a cashier/stocker in a convenience store, and in two factories as a production worker. She also worked for two years caring for her mother who had Alzheimer's disease.

Smith began working for Britthaven in March 2004 as a dietary aide. Smith outlined her job duties as a dietary aide which required her to assist with cooking, stocking, cleaning, sweeping, mopping, washing dishes, washing pots and pans, making desserts, making drinks, placing food on a cart, pushing a food cart, and giving trays to other aides. Her job required her to lift up to fifty pounds. On October 18, 2006, she was walking from the kitchen to the dining room when she slipped and fell, landing on her back and left side. Smith stated when she got up after the fall, she experienced a "crick" in her neck. The next morning, her neck was hurting and Britthaven sent her to see a doctor.

Due to her injuries, Smith underwent diagnostic testing and physical therapy. She was prescribed medication and ultimately had a three level cervical fusion which provided little relief. Smith stated she continues to have problems with neck pain, headaches, left shoulder, arm, and wrist pain. Smith engages in none of the recreational activities she enjoyed prior to her work injury. Likewise, Smith testified she does not believe she can perform any of her past work due to her inability to stand, walk or sit for any length of time, and difficulty with lifting. Smith also stated she has difficulty with dressing, bathing, washing her hair, and bending over. Finally, Smith testified she is not currently taking any medication because her physician refuses to see her due to a failure to obtain approval for additional diagnostic testing.

Smith supported her claim with records from Dr. Arendall, her treating neurosurgeon, who began treating her in March, 2007. Those records included office treatment notes, off work slips, summaries of diagnostic studies and Smith's statement regarding the history of her injury. Those records reflect Dr. Arendall diagnosed Smith with herniated cervical disc for which he recommended a cervical discectomy and fusion. Dr. Arendall further noted Smith's complaints of neck pain had worsened, she had constant

headaches, and suffered chest pain radiating into her left shoulder. Those records also reflect epidural steroid injections were performed without providing any relief. A subsequent record dated April 18, 2008 reflects Dr. Arendall recommended a cervical fusion and opined Smith would most likely qualify for a 28% impairment rating based upon the 5th Edition of the AMA American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), upon reaching maximum medical improvement ("MMI"). He also anticipated she would be restricted from pushing, pulling, or lifting over 25 pounds with arms outstretched or overhead.

Smith filed a Form 107-I report completed by Dr. Arendall on January 23, 2010. In that report, Dr. Arendall stated Smith had undergone a three-level anterior diskectomy and fusion on July 16, 2008. He diagnosed a cervical disk herniation with progressive stenosis. He assessed a 28% impairment rating based upon the AMA Guides. He also stated as a result of the work-related injury, restrictions should be imposed, and opined Smith does not retain the capacity to perform the job she held at the time of the accident. The restrictions outlined by Dr. Arendall included walking only 1 to 2 city blocks, sitting no more than 30 minutes at a time, standing no more than 30 minutes

at a time, standing or walking less than two hours in an 8-hour working day, and sitting no more than two hours in an 8 hour working day, with the requirement she take several breaks during the work day. Dr. Arendall also advised Smith could occasionally lift up to ten pounds and rarely lift up to twenty pounds. He also indicated she could rarely look down (sustained flexion of neck), turn her head right or left, look up, hold her head in a static position, twist, stoop, and climb ladders. She could occasionally crouch/squat or climb stairs.

Dr. Arendall testified by deposition on December 15, 2010. He agreed the 28% impairment rating he anticipated in his note of April 18, 2008 was an assumption based upon average cervical outcomes. He added Smith had a "less-than-best" outcome from her surgery. He further advised Smith should avoid lifting over ten pounds occasionally or over twenty pounds rarely. He advised Smith had reached MMI and her symptoms will continue. He reiterated he would only allow Smith to attempt to work within the restrictions outlined in the Form 107-I report.

Smith also submitted a report from Dr. Wagner who performed a psychological/vocational evaluation on April 8, 2010. Dr. Wagner stated Smith would be totally

occupationally disabled based upon the restrictions outlined by Dr. Arendall. He also stated as follows:

> "by virtue of the lack of limitations in Dr. O'Neal's [sic] record as well as Dr. Sheridan's[1] record, this individual would not have any restricted work markets and should be able to return to any form of former work activity which she had engaged."

Dr. Wagner diagnosed a dysthymic disorder and panic disorder with agoraphobia, and assessed a 20% impairment rating based upon the AMA Guides, 2nd edition.

Dr. O'Neill, an orthopedic surgeon, evaluated Smith at Britthaven's request on November 30, 2009. He noted the injury date of October 18, 2006. Dr. O'Neill diagnosed cervical disc protrusion with herniation at C5-6; degenerative disc disease with mild disc protraction at C4-5; and a right para-central disc protrusion at C6-7. He observed Smith's surgery did not help, and only the C5-6 component of the surgery was reasonable. Dr. O'Neill stated Smith could return to work as a dietary aide with restrictions of no awkward position of the neck. He further advised she would have no restrictions lifting, pushing, pulling or carrying. He assessed a 26% impairment rating based upon the AMA Guides.

[1] The record does not reflect a report from Dr. Sheridan was ever filed.

Smith was evaluated by Dr. Shraberg, a psychiatrist, at Britthaven's request on July 16, 2010. Dr. Shraberg noted, "Ms. Smith has a long history of being a somewhat angry and irritable person, forming poor relationships and isolative." He also noted, "there is no evidence, whatsoever, of an exacerbation or a permanent psychiatric impairment related to her neck injury." Dr. Shraberg diagnosed:

> "Adjustment Disorder of Adult Life associated with vocational uncertainty – nondisabling; Personality Disorder, mixed; Paranoid with strong schizoid features; and, Elements of symptom magnification per psychological testing."

Dr. Shraberg opined Smith would have a 0% impairment rating based upon the AMA Guides, 2nd edition, and 5th edition.

A Benefit Review Conference ("BRC") was held on March 29, 2011. The BRC order and memorandum reflects Smith received temporary total disability ("TTD") benefits from April 9, 2007 through March 9, 2008, and again from July 6, 2008 through March 9, 2010 at the rate of $184.58.

In the opinion, award and order rendered May 31, 2011, the ALJ found as follows:

SECTION VI – FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. What is the extent and duration of the plaintiff's physical

work injury? The plaintiff argues that she has sustained a 28% whole person impairment and no longer retains the capacity to return to her pre-injury employment. The defendant argues that the plaintiff has sustained a 26% whole person impairment and that she does retain the capacity to return to her pre-injury employment.

"It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability." *McNutt Const./First Gen. Servs. v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001). The ALJ is free "to believe part of the evidence and disbelieve other parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

The ALJ is presented with the opinions of two highly trained and well-respected surgeons. Having considered the record, I am more persuaded by the opinion of Dr. Arendall, the plaintiff's treating surgeon, as to the extent of the plaintiff's impairment. I therefore find that she had sustained a 28% whole person impairment.

Dr. Arendall has recommended extensive restrictions on the plaintiff's abilities. He also seems to have reservations about the plaintiff's ability to return to her pre-injury work, specifically his indication that the plaintiff "could try."

The plaintiff further argues that as a result of the October 18, 2006 work injury, she is permanently and

totally disabled. The defendant argues otherwise. KRS 342.0011(11)(c) defines "permanent total disability" as 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 the result of an injury.

In *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000) the court stated:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c) and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, 432 S.W.2d 800, [sic] it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. *A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities.* The definition of 'work' clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See Osborne v. Johnson, supra, at 803. (Emphasis ours.)

This ALJ notes that the plaintiff has undergone a three level cervical fusion and has testified that she endures continuing pain and explosive headaches as a result. In addition, the plaintiff is over the age of 50 with modest education. She has lifting restrictions that would preclude her from returning to any of the types of duties she has performed in the past. Accordingly, this ALJ considering the factors stated above, [sic] I am persuaded that the plaintiff is totally occupationally disabled. I find accordingly.

2. Did the plaintiff sustain a psychological injury as defined by the Act? Dr. Wagner, on behalf of the plaintiff, concludes that the plaintiff has sustained a 20% psychological impairment because of her work injury. The defendant argues that the plaintiff's psychological symptoms predated her work injury. Dr. Shraberg indicated the plaintiff has long been isolative with an angry personality. This did not come from the work injury but on other stressors in her life including the actions of her son-in-law.

Having considered the evidence, this ALJ is more persuaded by the opinion of Dr. Shraberg. I therefore find that the plaintiff did not sustain a psychological injury as defined by the Act. I further find that the defendant is not responsible for the expenses of the plaintiff's psychological care.

3. Has there been a failure for reasonable medical treatment? The plaintiff argues that the defendant has unreasonably refused to pay for pain management treatment. The defendant

argues that pain management treatment has not been refused. The defendant has only declined to pay for additional diagnostics requested by the pain management physician.

KRS 342.020 requires the employer to pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease.

Physicians for the parties agree that the plaintiff will require ongoing pain management. More than one physician herein has indicated reservations regarding the use of narcotic medication. Although Dr. O'Neill opines that the plaintiff requires no additional diagnostic or injection therapy, I am more persuaded by the opinion of Dr. Arendall that the plaintiff requires pain management treatment from Dr. Love. I therefore find that the defendant has failed to pay for reasonable and necessary treatment.

4. Has there been and [sic] underpayment of temporary total disability benefits? The parties reserved this issue at the benefit review conference. The parties stipulated that the plaintiff received temporary total disability benefits through March 9, 2010. Dr. Arendall found the plaintiff at MMI as of March 11, 2010. Having concluded that the plaintiff is totally occupationally disabled, I find that he [sic] underpayment of one day it [sic]

temporary total disability benefits is offset by the finding of total occupational disability with benefits beginning March 10, 2010.

SECTION VII-ORDER AND AWARD

Having thoroughly reviewed this file, and this ALJ being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The plaintiff is awarded total permanent disability benefits at the rate of $184.58 per week beginning March 10, 2010 and continuing for the duration of her disability. Said benefits shall not be paid for any period which plaintiff was entitled to receive TTD. Pursuant to KRS 342.730 (4) all income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old age Social Security Retirement Benefits under the United States Social Security Act.

2. The plaintiff shall recover of defendant/employer and/or its insurance company for the cure and relief of any effects of the injuries, medical, surgical, hospital treatment, including nursing, medical or surgical supplies, and appliances as may reasonably be required at the time of the injury and thereafter during disability.

3. All motions for approval of attorney’s fees shall be filed within 30 days of the final disposition of this award.

In the order on reconsideration, the ALJ specifically stated:

> As stated in the opinion, the ALJ relied on both the opinion of Dr. Arendall and the testimony of the plaintiff. Also as stated in the opinion, the definition of work does not require that an employee be homebound to be found permanently and toally disabled. The ALJ considered the limitations assessed by Dr. Arendall, the plaintiff's age, modest education, and the pain and headaches she endures. Based on all these factors, the ALJ concluded that the plaintiff cannot find work consistently under normal employment conditions. Finding no error, on this point the petition for reconsideration is OVERRULED.

As noted previously, the crux of this appeal is whether the ALJ's assessment of permanent total disability is supported by the evidence. Authority has long acknowledged that in making a determination granting or denying an award of permanent total disability, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. *See* Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky.

1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

It was within the ALJ's discretion as fact-finder to pick and choose from the evidence whom and what to believe. Caudill v. Maloney's Discount Stores, supra. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Britthaven has argued Dr. Arendall modified his opinions in his deposition, opining Smith "could and should return to work". Therefore, Britthaven argues the ALJ's reliance upon Dr. Arendall in finding Smith to be totally occupationally disabled is misplaced. We disagree. In fact, Dr. Arendall specifically testified at his deposition, at pp. 13 – 14, as follows:

> Q. . . . First, in regard to Ms. Smith returning to work, it would be your opinion that if she were to return to work, she should follow the restrictions as outlined in your

> medical report that was referenced earlier, dated January of 2010[2] ?
>
> A. Yes, sir, that's correct.

Although Britthaven has argued Smith is not totally disabled based upon its interpretation of Dr. Arendall's testimony she could and should return to work, we do not believe the ALJ erred in making such an award. The specific restrictions outlined in the Form 107-I report, as well as Dr. Arendall's testimony he would only allow Smith to attempt to return to work within the restrictions outlined in that report, support the ALJ's award.

After reviewing the evidence of record, the ALJ applied the appropriate legal standard for determining permanent total disability in accordance with the Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). It is readily apparent the ALJ relied upon the totality of the evidence rather than a soundbite.

The ALJ specifically enumerated all of the information from Dr. Arendall taken into account in making his assessment. Likewise, he specifically noted Dr. Arendall's comments outlining Smith could work within the

[2] The Form 107-I report completed by Dr. Arendall on January 12, 2010, and filed as evidence.

confines of her restrictions. Notwithstanding those comments, taking into account Smith's age, education and past work experience, in conjunction with her post-injury physical status, the ALJ was persuaded due to the effects of Smith's work-related injury, she no longer retains the ability to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy (See KRS 342.0011(11)(c) and (34)), no matter how therapeutic that may be. Substantial evidence of record exists to support that conclusion. For that reason, we cannot say the outcome arrived at by the ALJ finding Smith entitled to an award of permanent total disability benefits is so unreasonable under the evidence the decision must be reversed.

That said, we note KRS 342.285(2)(c) provides the Board may determine on appeal whether an order, decision, or award is in conformity to the provisions of KRS Chapter 342, and KRS 342.285(3) provides, in relevant part, the Board may "in its discretion" remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." These provisions permit the Board to *sua sponte* reach issues even if unpreserved in order to properly apply the law. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004).

We note the parties stipulated the amount and duration of TTD benefits paid. However, the ALJ failed to make any specific finding either adopting or modifying the parties' stipulation.

Specifically, the ALJ stated in the opinion, award and order:

> The parties stipulated that the plaintiff received temporary total disability benefits through March 8, 2010. Dr. Arendall found the plaintiff at MMI as of March 11, 2010. Having concluded that the plaintiff is totally occupationally disabled, I find that he[sic] underpayment of one day it[sic] temporary total disability benefits is offset by the finding of total occupational disability benefits beginning March 10, 2010.
>
> . . .
>
> The plaintiff is awarded total permanent disability benefits at the rate of $184.58 per week beginning March 10, 2010 and continuing for the duration of her disability. Said benefits shall not be paid for any period which plaintiff was entitled to receive TTD.

However, the ALJ specifically failed to address the time period(s) during which Smith would be entitled to TTD benefits. We therefore remand this claim for entry an amended opinion, award and order for a finding regarding

Smith's entitlement to and the appropriate award of TTD benefits.

Accordingly, the decision rendered May 31, 2011, by Hon. Lawrence F. Smith, Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered August 8, 2011, are hereby **AFFIRMED IN PART, VACATED IN PART, AND REMANDED** for further findings and entry of an amended opinion and award in conformity with the views expressed herein.

ALL CONCUR.

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