Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 28, 2011

CLAIM NO. 200870994

CAROL R. DUNAVAN PETITIONER

VS. **APPEAL FROM HON. JAMES L. KERR, ADMINISTRATIVE LAW JUDGE**

WALGREEN CO.
and HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Carol Dunavan ("Dunavan") appeals from the August 19, 2011, opinion and award rendered by Hon. James L. Kerr, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits

in a claim filed against Walgreen Co. ("Walgreen"). No petition for reconsideration was filed.

On appeal, Dunavan argues the ALJ erred in finding her to be only partially rather than totally disabled. She also argues the ALJ abused his discretion by considering the vocational report of Mr. Scott Gould. Finally, Dunavan argues the ALJ erred by apportioning 8% of her impairment to prior active conditions. We affirm.

It is undisputed Dunavan sustained a low back injury on July 15, 2008, as she was lifting a box of four to six gallons of water. Likewise it is undisputed Dunavan underwent a lumbar fusion as a result of her work injury. Dunavan testified by deposition on April 26, 2011, and again at the hearing held June 21, 2011. Dunavan is a resident of Louisville, Kentucky who was born on March 20, 1965. She is a high school graduate with no specialized or vocational training, and she has not attended college.

Dunavan began working for Walgreen as a cashier in November 2005. She later became a shift manager requiring her to work eleven to twelve hours per day for seven days, after which she would be off work for seven days. Dunavan's previous employment included working as a waitress/hostess, processing credit card receipts and as a department manager for a grocery store. On July 15 2008,

Dunavan experienced a pop in her back while lifting a box containing four to six gallons of water. This incident occurred late at night and she reported it to her supervisor the next morning. Dunavan sought medical treatment a week later. She eventually underwent a fusion surgery performed by Dr. Casnellie.

Dunavan testified she attempted to return to work with restrictions after the surgery. She worked from February 10, 2009 through March 3, 2009, when she was again taken off work by Dr. Casnellie. She has not worked since that time, and she testified she does not believe she can return to work due to difficulty with sitting, standing and walking. She also indicated she has problems with forgetfulness, drowsiness and fogginess due to the medications she is required to take as a result of her work injury. Specifically, Dunavan testified she takes rest breaks lasting forty-five minutes to an hour after approximately thirty minutes of activity.

Dunavan testified her current complaints include constant, aching low back pain as well tingling in the right leg and muscle spasms in her back. As a result of the need to rest, the effect of the medications, and her residual problems, Dunavan stated she does not believe she can perform any of her previous work. Likewise, she

testified she is unable to perform any of the recreational activities she enjoyed prior to her work accident. Dunavan admitted she previously sustained an injury to her low back in the 1990's when she fell down a flight of stairs, and had undergone chiropractic treatments in 2004. However, she had no active problem with her low back prior to the July 15, 2008 accident.

Dunavan supported her claim with the records from Dr. Casnellie, her treating orthopedic surgeon, and from Norton Hospital, including the operative note of July 27, 2009 outlining the surgical procedure performed. In his July 27, 2009 record, Dr. Casnellie diagnosed Dunavan with internal disc derangement, posterior annular tears, facet atrophy, and stenosis at L4-5 and L5-S1. He also diagnosed lumbar radiculopathy, as well as intractable back and lower extremity pain. In his note dated October 11, 2010, Dr. Casnellie stated Dunavan had reached maximum medical improvement ("MMI"), released her to return to light duty work, and imposed a 28% impairment rating based upon the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Casnellie opined the surgery, impairment and restrictions were due to the July 15, 2008 accident.

Dunavan also filed the report of Dr. Bilkey, who performed an evaluation at her request on January 27, 2011. Dr. Bilkey stated Dunavan sustained a lumbar strain due to repetitive lifting on July 15, 2008. He further stated Dunavan had lumbar radiculopathy superimposed upon degenerative disk disease, all of which was due to the July 15, 2008 work injury. Dr. Bilkey assessed a 29% impairment rating based upon the AMA Guides. In a subsequent report, Dr. Bilkey stated a subsequent review of chiropractic records from 2003 and 2004 did not alter his previous opinion.

Dunavan also filed the February 19, 2011 report of Mr. Robert Piper who performed a vocational evaluation at her request on January 24, 2011. Mr. Piper noted Dunavan is a high school graduate with no vocational training. Considering Dunavan's complaints and the restrictions imposed by Dr. Bilkey and Dr. Casnellie, Mr. Piper opined she is precluded from all full-time employment.

Subsequent to the hearing, and in response to the filing of a vocational report by Walgreen, Dunavan filed office notes of Dr. Peters, which are generally illegible, but indicate a history of injury in 2008, with surgery in 2009. The primary complaint when Dr. Peters saw Dunavan on

July 1, 2011 was pain from the waist down. He prescribed Lyrica, Flexeril, Lortab, Lamictal and MS-Contin.

On May 18, 2011, Dunavan was evaluated by Dr. Gleis at Walgreen's request. Dr. Gleis noted Dunavan's history of working as a cashier, then assistant manager at Walgreen. Dunavan advised she experienced sudden low back pain when she lifted a box containing multiple gallons of water. Dr. Gleis reviewed numerous medical records including those of Dr. Stege, who treated Dunavan in 1990 reflecting she fell down a flight of stairs, after which she was referred to Dr. Lee, a neurosurgeon. He noted Dr. Stege also saw her again in 1997 for complaints of low back pain. The records also reflect treatment due to a motor vehicle accident in 1999 and for low back pain in October 2002 while working for Winn-Dixie. He also reviewed records from chiropractic treatment in 2003 and 2004 for low back pain. Dr. Gleis also reviewed a record from Dr. Altman [sic] from May 15, 2008 for treatment of low back pain for which Dunavan was prescribed Ibuprofen 800 mg. and Flexeril 10 mg. A request for a lumbar MRI was also considered at that time.

Dr. Gleis noted at the time of the evaluation Dunavan complained of low back pain, right groin pain, right hip pain, left hip pain, right leg pain, numbness and

tingling, and left leg pain. Dr. Gleis noted Dunavan exhibited 3 out of 5 positive Waddell's signs for symptom magnification. Dr. Gleis diagnosed Dunavan with a previous history of significant low back pain, as well as low back pain due to a July 15, 2008 or July 19, 2008 incident at work. Dr. Gleis assessed a 19% impairment rating based upon the AMA Guides. In a supplemental report, Dr. Gleis opined 8% of this rating was active prior to her work-related injury.

Dr. Gleis further stated "Ms. Dunavan's history of limited prior low back pain is inconsistent with the prior significant low back documentation in her medical records." Because of this, Dr. Gleis further stated, "her history should be discounted when determining a pre-existing active condition." Finally, Dr. Gleis stated, "apportionment evaluation would be very compromised because of her lack of forthright history." Without the prior low back condition, Dr. Gleis determined she would not have needed surgery. Based upon the complaints and the fact surgery had been performed, Dr. Gleis advised Dunavan to avoid lifting below knee level, repetitive lifting, and maximum lifting over ten to twenty pounds. He recommended aqua therapy and Lyrica, but opined injections, Flexeril, Ambien and narcotics should be avoided.

Walgreen also filed records from Dr. Atiman and Dr. Stege documenting the May 15, 2008 complaint of low back pain, as well as the first complaints of low back pain dating back to November 1991. Walgreen additionally filed treatment records documenting chiropractic treatment in excess of thirty times for low back pain between March 2003 and October 2004.

Subsequent to the hearing, Walgreen filed a vocational report from Mr. Scott Gould who performed a vocational evaluation on May 16, 2011. Mr. Gould determined, "[b]ased on my evaluation, Mrs. Dunavan is <u>not</u> totally and permanently disabled." He acknowledged she is limited to light duty, but should be able to procure employment within her restrictions.

Dunavan objected to the filing of the vocational report after the hearing. Specifically, Dunavan argued:

> In the alternative, if the Administrative Law Judge allows the report of Scott Gould to be admitted to evidence, the Plaintiff requests that she be allowed to also submit into evidence the medical records of her pain management physician, Dr. Lawrence H. Peters, for visits she had with Dr. Peters after the Hearing, and for which the workers[sic] compensation carrier could not approve until after the hearing.

The ALJ considered both the vocational report of Mr. Gould and the records of Dr. Peters, submitted post-hearing.

In the opinion and award rendered August 19, 2011, the ALJ found the following:

> **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
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> 18. The primary issue involves plaintiff's entitlement to benefits per KRS 342.730 including any exclusion of pre-existing disability/impairment. In her brief, plaintiff has argued for a finding of total occupational disability. A finding of total occupational disability is permitted per KRS 342.730 (1) (a). Ira A. Watson Department Store v. Hamilton, Ky., 34 SW3d 48 (2000). In so accessing[sic], the Administrative Law Judge is required to evaluate the plaintiff per the principles set forth in Osborne v. Johnson, Ky., 432 SW2d 800 (1968). The Administrative Law Judge notes that the plaintiff is relatively young at age 46 and is a high school graduate with no specialized or vocational training. A test performed by Mr. Gould revealed plaintiff to have an average I.Q. and plaintiff's [sic] reads and comprehends at the tenth grade level. The plaintiff did have an excellent work record although her prior applications for Social Security disability suggests an attempt to remove herself from the work force on two other occasions. The physicians limit the plaintiff to light duty work and the same was suggested by a functional capacity evaluation which was performed on August 16, 2010. The plaintiff has testified to the need to rest frequently and change positions frequently.

19. Despite plaintiff's testimony to her own disability, the objective medical evidence suggests that the plaintiff lacks the physical capacity to return to work as an assistant manager for the defendant-employer but the Administrative Law Judge believes that the objective medical and vocational evidence suggests that the plaintiff is not totally occupationally disabled and the Administrative Law Judge so finds. She is in her mid-forties, a high school graduate and capable of light duty.

20. Having concluded the plaintiff is not totally occupationally disabled, her claim must be evaluated per KRS 342.730 (1) (b) and (c). While the parties did not stipulate that plaintiff lacks the physical capacity to return to the type of work performed at the time of the injury, its expert, Dr. Gleis, limits the plaintiff to lifting 10 to 20 pounds at a maximum and to avoid lifting below knee level as well as repetitive lifting. The plaintiff has testified that she was lifting a box from floor level at the time of the injury and that she was required to lift in excess of 20 pounds frequently in her capacity as assistant manager. In addition, the treating physician, Dr. Casnellie, and the evaluating physician, Dr. Bilkey, have both concluded that the plaintiff lacks the physical capacity to return to her job as an assistant manager. Consequently, the Administrative Law Judge concludes that the plaintiff is entitled to the 3 multiplier permitted in KRS 342.730 (1) (c) 1.

21. As to the applicable impairment rating, the Administrative Law Judge notes that Dr. Casnellie has assessed a 28% whole person impairment, Dr. Bilkey

> has assessed a 29% whole person impairment and Dr. Gleis has assessed a 19% whole person impairment. Exercising the undersigned's prerogative to pick and choose among the various physicians, the Administrative Law Judge finds credible the opinion of the treating physician, Dr. Casnellie, that the plaintiff presently has a 28% whole person impairment, but also believes that Dr. Casnellie and Dr. Bilkey were uninformed as to significance of plaintiff's prior low back problems and treatment. In concluding that the plaintiff has a pre-existing active impairment, the Administrative Law Judge recognizes plaintiff's testimony that she did not treat for her low back during the course of her employment for the defendant-employer and her low back problems did not prevent her from performing her job for the defendant-employer. Nonetheless, the Administrative Law Judge believes Dr. Gleis who concluded in his supplemental opinion of June 27, 2011 that had he assessed the plaintiff prior to the work injury, he would have found her to have an 8% whole person impairment. Wherefore, plaintiff's award shall be based upon the 28% impairment rating assessed by Dr. Casnellie minus the 8% pre-existing active impairment of Dr. Gleis. Wherefore, the Administrative Law Judge finds that the plaintiff retains a 20% whole person impairment as the result of the injury of July 15, 2008 and is further entitled to the 3 multiplier.

As noted above, Dunavan argues the ALJ erred in finding her to be partially rather than totally disabled. She also argues it was error to allow Walgreen to file Mr.

Gould's report. Finally, Dunavan argues the ALJ erred by apportioning 8% impairment to pre-existing active conditions. We disagree.

We do not believe the ALJ erred in allowing Walgreen to file Mr. Gould's vocational report after the hearing. Dunavan underwent the vocational evaluation long before the hearing was held. Dunavan should not have been surprised a report was generated from that evaluation. It is also noted Dunavan had previously submitted a vocational report in support of her claim. Likewise, although she now argues she was deprived of the opportunity to testify in rebuttal to the report, Dunavan did not ask for time to do so. She merely argued if the report was admitted into evidence, the office notes from Dr. Peters should be considered as well. This was done. Therefore we find the ALJ committed no error by allowing Walgreen to file the report.

Next we turn to Dunavan's argument the ALJ erred in finding her to be only partially not totally disabled. In the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on

the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Despite Dunavan's argument regarding the admissibility of the vocational report, because Walgreen was successful before the ALJ in demonstrating she was partially rather than totally disabled, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). 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 Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve 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 (Ky. 1977).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

In this instance, the ALJ clearly set forth the basis for his determination Dunavan was partially rather than totally disabled. This determination is supported by the opinions expressed by Dr. Gleis in his report and Mr. Gould's vocational assessment. Therefore, we believe the ALJ's decision awarding partial rather than total

disability benefits is supported by substantial evidence and the ALJ's decision will not be disturbed.

Finally, Dunavan argues the ALJ erred in finding 8% of her impairment rating was due to pre-existing active conditions based upon Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). We disagree. Dunavan treated for back complaints periodically since 1991. Prior to the work accident, she sought medical treatment for low back pain for which she was prescribed medication in May 2008, a mere two months prior to her work injury. At that time, a consideration of referral for an MRI was also made. Based upon this finding, Dr. Gleis determined 8% of the impairment rating was due to a prior active condition. We do not believe it was error for the ALJ to rely upon this opinion in making his determination.

Accordingly, the opinion and award rendered August 18, 2011 by Hon. James L. Kerr, Administrative Law Judge is hereby **AFFIRMED.**

ALL CONCUR.

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