# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: May 22, 2015**

CLAIM NO. 201280638

DENTAL HEALTH ASSOCIATES, INC. PETITIONER

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

CAROLYN ANN GILVIN
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**

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

**RECHTER, Member.** Dental Health Associates, Inc. ("DHA") appeals from the November 25, 2014 Amended Opinion and Order on Remand, and the January 5, 2015 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). DHA argues there is insufficient evidence to support the award of permanent

total disability benefits to Carolyn Gilvin ("Gilvin"). It further claims the ALJ's analysis is inadequate. For the reasons set forth herein, we affirm.

This Board has considered two prior appeals from the ALJ's original award in this matter. On January 15, 2014, the ALJ rendered an award of permanent total disability. DHA appealed, and this Board reversed and remanded the claim to the ALJ, determining it was error for the ALJ to consider Gilvin's non-work-related injuries in analyzing whether she is permanently totally disabled. The ALJ issued an Amended Opinion and Award on Remand on June 19, 2014. Again, the ALJ determined Gilvin is permanently totally disabled. DHA again appealed, and this Board concluded the ALJ had not conducted a sufficient analysis. We directed the ALJ to consider how Gilvin's physical restrictions impact her job duties, and how her education factors into a determination of permanent total disability. The ALJ has now rendered a third Opinion and Order in this matter, again finding Gilvin permanently totally disabled. We previously summarized the relevant evidence as follows:

> Gilvin filed a Form 101 on July 1, 2013 alleging she sustained bilateral carpal tunnel syndrome, a left shoulder injury, and a cervical injury on April 12, 2012 due to cumulative trauma. Gilvin stated her job required sitting, reaching, lifting, twisting, turning, pulling and

pushing. Her work history reflects she worked as a case coordinator in a dental office from July 2002 through November 30, 2012. She previously worked as a medical claims processor for an insurance company.

Gilvin testified by deposition on October 14, 2013, and at the hearing held December 18, 2013. She was born on April 12, 1962, and resides in Paris, Kentucky. She is a high school graduate with an Associate's Degree from Fugazzi Business College. In addition to her work in the dental office, and as a medical claims processor, she has worked as a waitress, receptionist, baby sitter, hot walker for a horse farm, clerk in a meat market and for an answering service.

When she was initially hired by DHA in July 2002, Gilvin's job required her to input billing information. Her job additionally required preparing payroll, and making bank deposits. She described her job at DHA consisted of typing eight to ten hours per day, three days per week, and four and a half hours on her remaining workday. She stated she was also required to lift bundles of files weighing in excess of thirty pounds. She also testified her job consisted of using the telephones, scheduling and working with charts. She resigned on November 30, 2012 because she was not allowed to work part-time, and she was unable to take leave pursuant to the Family Medical Leave Act.

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Gilvin stated Dr. Margaret Napolitano treated her right wrist, including a carpal tunnel release, and released her on August 20, 2012. She then treated with Dr. William O'Neill for the left wrist. Dr. O'Neill performed a left carpal tunnel release,

after which time she missed approximately two weeks of work due to hand and neck pain. She stated her hands have improved since she ceased working, but she still experiences pain and locking of her thumbs. She stated she does not believe she can return to her previous job.

Joanie Juett ("Juett"), the office manager for DHA, testified by deposition on October 25, 2013. Juett worked at DHA prior to 2004. She returned to DHA on a part-time basis in 2009, and full-time in 2010. She has training as a dental assistant and as a nurse. She has also completed computer and business coursework. She stated Gilvin's job as a front desk coordinator consisted of working with billing, collections, scheduling, answering the telephone, and processing payments. Juett stated Gilvin's job duties fell within the restrictions assessed by Dr. [James] Owen. She stated Gilvin's job only required use of a computer keyboard approximately two to three hours per day. She stated Gilvin did not report a neck injury. She further stated Gilvin resigned because part-time work was unavailable.

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Dr. O'Neill's records filed with the claim reflect treatment from August 29, 2012 through February 19, 2013. When Dr. O'Neill first saw Gilvin, he noted complaints of pain and numbness in the left hand, radiating up to her elbow, shoulder and neck area. On October 29, 2012, Dr. O'Neill stated Gilvin had undergone carpal tunnel releases to both wrists, and her left arm symptoms did not improve with surgery. Dr. O'Neill's initial treatment record reflects Gilvin should not use her left hand. He later

indicated she could do light duty work with no overhead activity.

Dr. Napolitano's records from April 12, 2012 through August 20, 2012 reflect Gilvin is right hand dominant, and developed pain, numbness, and tingling in both hands within the month prior to her first office visit. Dr. Napolitano performed a right carpal tunnel release in May 2012. She stated Gilvin's wrist problems were work aggravated, although she stated she could not answer whether they were solely and directly related to her employment. In July, she noted Gilvin's right hand had improved significantly, and her symptoms were primarily in the left. In August 2012, Dr. Napolitano planned for Gilvin to have a left wrist injection, and allowed her to return to work. DHA filed records from Dr. Napolitano indicating Gilvin had reached maximum medical improvement ("MMI") from her right carpal tunnel condition, and was released to return to work with no restrictions. Dr. Napolitano opined Gilvin had no permanent disability from her right carpal tunnel syndrome.

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Gilvin was evaluated by Dr. James Owen on August 16, 2013. In his report dated August 26, 2013, Dr. Owen stated Gilvin developed cramps and sensory abnormalities in her thumbs, especially on the right, in March 2012. He stated the right carpal tunnel release eased her pain, and she was released to return to work on August 20, 2012 with no permanent disability. He noted she complained of pain in the left forearm radiating to her thumb. She reported a five year history of neck problems. Dr. Owen diagnosed persistent hand pain with bilateral grip weakness and mild dysesthesia, but no significant two-point discrimination abnormality

associated with bilateral carpal tunnel surgery.

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Regarding causation, Dr. Owen related Gilvin's carpal tunnel syndrome to her work. He stated "diabetes is a predisposing factor for carpal tunnel syndrome, and therefore was dormant, non-disabling, brought into disabling reality by the excessive use of her computer." Regarding the cervical spine, Dr. Owen opined, "The cervical spine itself, I feel, does not appear to be work related and there was no trauma associated, no car wrecks, etc." He stated Gilvin had reached MMI, and assessed an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for her wrist complaints. He stated Gilvin does not retain the capacity to return to work and should avoid lifting, handling, and carrying objects with either hand greater than 16 kg.

Gilvin also filed an undated, hand-written note from Dr. Owen stating she could not return to work as a financial counselor which required the persistent use of a computer. In addition to the restrictions enumerated above, Dr. Owen stated Gilvin should avoid repetitive use of either hand for typing or other activities requiring constant fine finger movement or gripping.

Dr. Thomas O'Brien evaluated Gilvin at DHA's request. In his report dated February 16, 2013, Dr. O'Brien diagnosed bilateral carpal tunnel syndrome which he found not causally associated with her work as a front desk coordinator. He stated, "The woman's carpal tunnel syndrome is due to a combination of her

age and the soft tissue and bony anatomy of her carpal canal and her history of tobacco use." He stated her cervical degenerative changes have no causal relationship to her work.

DHA filed treatment records from Dr. Roberta Allison, Dr. James Ferrell, and Dr. Melville for over sixty office visits between February 3, 1999 and July 3, 2012. Those records reflect treatment for various maladies including rashes, hypertension, anxiety, depression, low back pain, sinusitis, etc. The following notes reflect treatment for Gilvin's upper extremities:

March 11, 2008, carpal tunnel syndrome

April 30, 2009, complaints of numbness in both upper extremities

June 14, 2010 acute left elbow problem unresolved

June 23, 2011 complaints of discomfort in the left arm and shoulder, and carpal tunnel syndrome in the left hand

July 26, 2011 sill having pain in left hand

Dr. Ronald Burgess evaluated Gilvin at DHA's request on October 21, 2013. He stated she is at MMI from her carpal tunnel releases. He opined her carpal tunnel syndrome is due to her gender, age, and early diabetes, and is unrelated to her work. He assessed a 3% impairment rating pursuant to the AMA Guides. Dr. Burgess disagreed with Dr. Owen's impairment rating, stating it improperly included loss of grip strength which is prohibited by the AMA Guides, specifically on page 494. Dr. Burgess stated Gilvin could return to

> her previous job without restrictions, and any residual numbness is due to her cervical condition.
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> DHA also filed the vocational report of Dr. Ralph Crystal who evaluated Gilvin on December 16, 2013. He stated she could return to work to her previous job based upon the medical opinions. He did not believe Gilvin is disabled.

In the November 25, 2014 Opinion and Order on Remand, from which DHA now appeals, the ALJ determined Gilvin is permanently totally disabled. He provided the following analysis concerning the extent of Gilvin's impairment:

> As indicated hereinabove, I am the only decision maker who actually saw and heard the plaintiff Mrs. Gilvin testify. I sat a few feet from her during her testimony. I carefully observed her facial expressions during her testimony. I carefully listened to her voice tones during her testimony. I carefully observed her body language during her testimony. She was a very stoic lady. I make the factual determination that she was a very credible and convincing lay witness. I make the factual determination that her testimony rang true.
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> 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, based upon the credible and convincing lay testimony of Mrs. Gilvin, as covered in detail above, and the persuasive and compelling medical evidence from Dr. Owen, as covered in detail above, I made the determination that as a result of Mrs. Gilvin's work-related injuries to both upper extremities, she will under the AMA Guides, Fifth Edition, have a permanent whole person impairment of 8%. I note that Mrs. Gilvin worked for the defendant for 10½ years as a case coordinator. She worked on computers and the telephone and moved a large volume of patient's charts each day. She spent almost the entirety of each work day doing data entry on a computer. She worked on a computer 3 days a week 10 hours a day and 1 or 2 days a week 4 hours a day. She started having problems with her wrists on April 12, 2012. She began waking up during the night with pain in both thumbs. She went to Dr. Napolitano, a hand specialist, who performed right carpal tunnel surgery on her in May, 2012. She went to Dr. O'Neill, an orthopedic surgeon, and he performed carpal tunnel surgery on her left side in September, 2012. After undergoing bilateral carpal

tunnel surgeries, she has continued to experience significant pain in both wrists and arms. She experiences sharp pain in both thumbs and the first couple of fingers of each hand. She also experiences numbness of her left arm and into her left shoulder and the left side of her neck. She cannot turn her neck to the left. The pain is worse on her left side than on her right side. She experiences pain in both upper extremities every day. Mrs. Gilvin's hands are both weak and she cannot grip anything. She is unable to drive because she cannot grip and turn the steering wheel. Due to her bilateral upper extremity pain, she cannot wash a full load of dishes. Due to her upper extremity pain, she cannot type on her iPad. She experiences numbness in both hands. Mrs. Gilvin testified that with these painful symptoms she cannot return to work at her former job for the defendant.

In making the determination that Mrs. Gilvin is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

Dr. James Owen's diagnoses regarding Mrs. Gilvin were persistent hand pain with weakness of grip bilaterally with mild dysesthesia, but no significant two-point discrimination abnormality associated with bilateral carpal tunnel surgeries and also persistent neck pain with nonverifiable radicular symptomatology, with the neurological examination being negative for reflexes and sensory abnormality. Dr. Owen stated that Mrs. Gilvin did not have an active impairment prior to her work injuries and is at maximum medical improvement. Dr. Owen stated that using the AMA Guides, Fifth Edition, the

plaintiff's permanent whole person impairment will be 8%. Dr. Owen stated that the plaintiff had described the physical requirements of the work which she performed at the time of her injuries and that she does not retain the physical capacity to return to the type of work which she performed at the time of her injuries. Dr. Owen stated that physical restrictions should be placed upon Mrs. Gilvin's work activities as a result of her work injuries and that her restrictions included avoidance of lifting, handling and carrying objects with either hand greater than approximately 16 kilograms. In Dr. Owen's supplemental medical report, he stated that Mrs. Gilvin cannot return to work as a financial counselor, which employment required the persistent use of a computer. Dr. Owen also stated that Ms. Gilvin should avoid repetitive use of either hand for typing or other activities requiring constant fine finger movement or gripping.

In making the determination that the plaintiff Mrs. Gilvin is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

In this case, I carefully considered the severity of Mrs. Gilvin's 2012 work injuries to both upper extremities, as documented in her sworn testimony and also the medical evidence from Dr. Owen, all of which was credible, convincing, persuasive and compelling. I also took into consideration Mrs. Gilvin's age, which is now 51, meaning that she is an older worker in the highly competitive job market. I also took into consideration the fact that Mrs. Gilvin last worked on November 30, 2012, which is approximately 2 years ago. It is

uncontradicted that she has not been able to obtain new employment over that period of time, which is completely consistent with the fact that she is an older worker in the highly competitive job market. I took into consideration her educational background. She graduated from high school back in 1990 and obtained her Associate's Degree from business college in 1991. Her formal education ended more than 20 years ago. It is uncontradicted that she has not had any specialized training or education since 1991.

In making the determination that Mrs. Gilvin is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion.

I also relied upon the decisions of Kentucky's highest court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky.1979) and *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky.2000).

In making the determination that Mrs. Gilvin is permanently and totally disabled, I specifically took into consideration how Dr. Owen's physical restrictions imposed upon her prevented Mrs. Gilvin from performing her job duties. I also considered what her actual job duties were for the defendant and weighed those factors in reaching the ultimate conclusion. In making the determination that the plaintiff Mrs. Gilvin is permanently and totally disabled, I carefully considered the testimony of Joanie Juett, the defendant's office manager, as covered in detail above, and carefully analyzed her testimony in reaching the ultimate conclusion.

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) 342.0011. 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 worker's 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).

In making the determination that the plaintiff Mrs. Gilvin is permanently and totally disabled, I weighed all of the above factors in reaching the ultimate conclusion. I make the determination that Mrs. Gilvin cannot find work consistently under regular

> work circumstances and work dependably. I, therefore, make the determination that she is permanently and totally disabled. I also make the determination that her permanent total disability began on November 30, 2012, the date she last worked.

DHA petitioned for reconsideration, arguing the ALJ failed to consider the reports of Gilvin's treating physicians, which were attached to her Form 101. The ALJ denied the petition. Although the Opinion and Order on Reconsideration is thirteen pages long, it is largely a word-for-word reiteration of the analysis provided in the November 25, 2014 Opinion and Order. Nonetheless, the ALJ added a few sentences to reaffirm his conclusion Gilvin continues to suffer substantial pain in her upper extremities.

On appeal, DHA first argues the ALJ provided insufficient analysis to support the determination Gilvin is permanently totally disabled. We disagree. In considering permanent total disability, the ALJ is required to make an "individualized determination of what the worker is and is not able to do after recovering from the work injury." McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001). The analysis includes "consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and

how those factors interact." Ira A. Watson, 34 S.W.3d at 52. Furthermore, as in all workers' compensation cases, the ALJ must provide findings of fact sufficient to inform the parties of the basis of his decision and to permit meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988).

Here, we believe the ALJ has sufficiently articulated the basis of his decision. The ALJ stated his reliance on Dr. Owen's opinions as to Gilvin's physical capabilities, and Gilvin's testimony concerning her ongoing pain. The ALJ discussed Gilvin's age, her education, and her prior work history. Clearly, he was most persuaded by Gilvin's own assessment of her ability to work consistently and reliably. Thus, we cannot conclude the ALJ has failed to sufficiently articulate the basis of his decision, or failed to conduct the requisite analysis pursuant to Ira A. Watson.

Rather, the crux of DHA's complaint is how the ALJ weighed the evidence. It argues the finding of permanent total disability is not supported by substantial evidence. DHA points to significant proof indicating Gilvin retains the physical capacity to return to work. DHA emphasizes that neither Dr. Napolitano nor Dr. O'Neill, Gilvin's treating physicians, have recommended permanent physical

restrictions. Both physicians released Gilvin to return to full duty work and, in fact, she worked for five months after her second carpal tunnel release surgery. DHA argues Gilvin eventually ceased working for DHA due to a non-work-related condition.

On appeal, our function is to determine whether the ALJ's findings are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson, 34 S.W.3d at 52. We must ensure the ALJ has applied the correct legal standards, but we may not usurp the ALJ's role as fact-finder by superimposing our own appraisals as to the weight and credibility to be afforded the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

We acknowledge, as DHA strenuously emphasizes, the ALJ did not summarize the medical records of Drs. Napolitano or O'Neill in his November 25, 2014 Opinion and Order on Remand. Instead, he stated he had "carefully reviewed and considered" their medical records. In summarizing Gilvin's testimony, the ALJ also acknowledged Drs. Napolitano and O'Neill performed carpal tunnel release surgeries. Nowhere does the ALJ specifically recognize Drs. Naplotino and O'Neill released Gilvin to return to full duty work following the two surgeries.

Nonetheless, we do not believe this omission is fatal, due to the ALJ's reliance on Dr. Owen. Dr. Owen opined Gilvin cannot return to work, should not lift over 30 pounds, and should not engage in activities that requires constant fine finger movement, such as typing. The ALJ summarized and rejected Dr. Burgess' opinion, similar to that of Drs. Napolitano and O'Neill, that Gilvin could return to her work without restrictions.

The ALJ was also persuaded by Gilvin's own assessment of her physical capacity and the pain she currently experiences, including numbness in her fingertips and a weak grip in both hands. He relied upon her testimony that her position at DHA required constant data entry on computers and "going through" patient charts. Furthermore, the ALJ acknowledged Gilvin's Associate Degree, but weighed this background against the fact she has had no formal education in over twenty years.

Upon a thorough review of the evidence, we cannot conclude the ALJ's decision is so unreasonable it must be reversed as a matter of law. Though Drs. Napolitano and O'Neill treated Gilvin, the ALJ is not required to afford their opinions more weight than an examining physician's opinion. Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829, 833 (Ky. 2008). Furthermore, Gilvin's testimony

of her physical condition and her ability to perform activities is competent evidence upon which the ALJ may rely. Hush v. Abrams, 584 S.W.2d 48 (1979). We also note, contrary to DHA's assertions on appeal, Gilvin testified she resigned because she "had problems with her hands and neck". Thus, at least in Gilvin's estimation, her decision to cease working was not due solely to her non-work-related neck condition. Though DHA has presented persuasive evidence indicating Gilvin is not permanently totally disabled, this alone is not a basis for reversal of the award. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Upon review of the record, we cannot say the ALJ's decision is devoid of evidentiary basis. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Therefore, we must affirm.

For the foregoing reasons, the November 25, 2014 Amended Opinion and Order on Remand, and the January 5, 2015 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON LYN DOUGLAS POWERS
1315 HERR LANE STE 210
LOUISVILLE, KY 40222

**COUNSEL FOR RESPONDENT:**

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON, KY 40741

**ADMINISTRATIVE LAW JUDGE:**

HON. WILLIAM J. RUDLOFF
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601