OPINION ENTERED: March 1, 2013

CLAIM NO. 200585559

EPI CORPORATION PETITIONER

VS. **APPEAL FROM HON. ALLISON E. JONES, ADMINISTRATIVE LAW JUDGE**

JENNIFER BOLING
and HON. ALLISON E. JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. EPI Corporation ("EPI") seeks review of a decision rendered September 21, 2012 by Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ"), denying its request to reduce the permanent partial disability ("PPD") award to Jennifer Boling ("Boling") in an opinion and award rendered December 27, 2009, by Hon. Lawrence F.

Smith, Administrative Law Judge ("ALJ Smith"). EPI also appeals from the order entered November 7, 2012, denying its petition for reconsideration.

On appeal, EPI argues the ALJ erred by concluding it failed to present sufficient evidence to support a finding of a reduction of permanent disability. Because the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled, we affirm.

Boling obtained a doctorate in physical therapy from Bellarmine University. She began working as a physical therapy assistant for EPI while she was awaiting the results of her boards. On April 19, 2005, she sustained an injury to her right thumb as she attempted to prevent a patient from falling by grabbing a gait belt. In doing so, she dislocated her thumb. She subsequently developed reflex sympathetic dystrophy ("RSD") and hyperadrenergic postural orthostatic tachycardia syndrome ("POTS"). She filed a Form 101 on December 6, 2006 alleging injuries to her "right thumb, right upper extremity, and sympathetic symptoms resulting in increased heart rate and blood pressure."

In her original claim, Dr. Warren Breidenbach, a Louisville hand surgeon, testified by deposition on May 1, 2007, Boling sustained an injury to her right thumb for

which he recommended surgery. Dr. Breidenbach testified he knew little about POTS, and was unqualified to state whether it was caused by the thumb injury.

Dr. David Wood, Boling's treating endocrinologist, testified by deposition on May 30, 2007. He began treating her in 2003 for polycystic ovarian syndrome, and other conditions unrelated to her work injury. He saw Boling on May 31, 2005, and was concerned she may be developing RSD. He also testified she had developed POTS. This was also reflected in Dr. Woods' office notes and reports subsequently filed. He related both the RSD and POTS to the work-related injury. Dr. Wood assessed a 70% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), and opined Boling was incapable of employment.

In addition to numerous medical records, reports and depositions from various physicians and medical facilities, Dr. Robert Nickerson performed a university evaluation, pursuant to KRS 342.315, on December 11, 2007. In his report of that date, Dr. Nickerson diagnosed Boling with right upper extremity complex regional pain syndrome

("CRPS")[1] type 1, and POTS which he determined were caused by her work-related injury. Dr. Nickerson assessed a 25% impairment rating pursuant to the AMA Guides. Dr. Nickerson again evaluated Boling, at EPI's request, on May 27, 2009. In his report, he reiterated the diagnoses of CRPS and POTS, and stated Boling lacked the capacity to perform gainful employment. He also reiterated his assessment of the 25% impairment rating.

In an opinion rendered December 27, 2009, ALJ Smith determined Boling's average weekly wage was $900.00 per week. He found Boling's POTS was work-related, and awarded PPD benefits based upon the 25% impairment rating assessed by Dr. Nickerson, enhanced by the three multiplier pursuant to KRS 342.732(1)(c)1.

Boling filed a petition for reconsideration arguing the ALJ erred by failing to include RSD with POTS in his assessment of her work-related conditions. In an order dated February 17, 2010, ALJ Smith amended his opinion to include RSD or CRPS as work-related, and noted polycystic ovarian syndrome is unrelated. Boling subsequently appealed ALJ Smith's decision to this Board alleging he erred in failing to award her permanent total

[1] RSD and CRPS are used interchangeably in the medical records, in reference to the same physical condition.

disability benefits. This Board affirmed ALJ Smith's decision in an opinion rendered August 8, 2010.

On June 9, 2010, EPI filed a motion to reopen alleging Dr. Breidenbach's records demonstrated her condition had changed, and with therapy she would be able to perform regular work. On August 3, 2010, ALJ Smith reopened the claim, issued a scheduling order and set a benefit review conference for October 4, 2010.

EPI subsequently filed Dr. Breidenbach's May 5, 2010 office note which states as follows:

> This patient says that where we did the superficial radial nerve release she is better but she is still complaining of pain in the region of the thumb. This time [sic] is shifted more from the radial side to the ulnar side. I did a rapid exchange grip today and she failed it. By that I mean on her right side the effected side, it went from 8 to 20. This is diagnostic of symptom magnification.
>
> I feel a little bit badly here because I did believe this patient had symptomatic independent pain and that it was probably [sic] which was solvable. I am now questioning my judgment even from the beginning. I think this patient probably had symptom magnification before and I probably should have done a rapid exchange grip prior to the surgery. Whether or not she truly had symptoms and the surgery did some benefit, it is now clear that she is not cooperating with the examination.

> I had a talk with the patient and explained to her that she is not ready to get back to work. We are going to advance her towards work over the next month. I will see her in six weeks[sic] time. I have encouraged her that she has the strength in her hand to work as a physical therapist. I think this patient is going [sic] end upon with a very low or no impairment. I think she [sic] be able to do regular duty work.

In his August 4, 2010 office note, Dr. Breidenbach opined Boling could return to work with no restrictions, and assessed a 0% impairment rating.

Boling filed records from Baptist Hospital East for treatment provided in September and November 2010 which do not appear to have any relevance to the issue on reopening. She then filed records from Dr. Wood dated August 30, 2010 and September 29, 2010 indicating he had continued to treat her for RSD. In a note dated June 5, 2012, Dr. Wood stated his opinions were unchanged from those he had previously expressed on May 30, 2007 and June 29, 2009. He noted no improvement in Boling's POTS or RSD, and no decrease in her functional impairment rating.

A hearing was held on July 24, 2012. Boling testified she had returned to work in August 2010 as a physical therapist, and in March 2011 had assumed an administrative position, primarily using a computer with

her left hand. She noted continued complaints of nausea, dizziness, fainting, headaches, fluctuations in blood pressure, gripping or using objects with her right hand, and standing for long periods of time. She testified Dr. Breidenbach performed surgery on her right thumb, but she continues to experience numbness, tingling and diminished strength in her right hand. She further testified her right arm is affected up to the elbow, and involves her entire right hand including all of her fingers. She has missed several days of work due to her work-related conditions.

Several attempts to schedule university evaluations on reopening were canceled for various reasons. The parties expressed a desire for Dr. Nickerson to again evaluate Boling, but he was unavailable to do so.

In her opinion rendered September 24, 2012, the ALJ found as follows:

> **III. Burden of Proof & Standard of Review**
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> An employer who seeks to reopen a final workers' compensation award and have it reduced bears the burden of proof and risk of non-persuasion concerning every element of its claim. *See e.g., Western Irving Die Cast v. Rice* 2011 WL 4431159, at *4 (Ky. 2011).
>
> The ALJ, as the fact-finder, has the discretion to determine the quality,

character, and substance of the evidence in the record. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002); *Miller v. East Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329, 331 (Ky. 1997). The ALJ can choose "to believe part of the evidence and disbelieve other parts of the evidence whether it came 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). When one of two reasonable inferences may be drawn from the evidence, the finder of fact may choose. *Jackson v. General Refractories Co.*, 581 S.W.2d 10, 11 (Ky. 1979).

An ALJ must state the evidentiary basis for each legal conclusion with sufficient specificity to permit a meaningful administrative and judicial review. *Big Sandy Comm. Action Program v. Chaffins*, 502 S.W.2d 526, 531 (Ky. 1973).

IV. Findings of Facts, Conclusions of Law & Evidentiary Analysis

A. Permanent Impairment

EPI Corporation asserts that "the undisputed evidence shows that Ms. Boling no longer suffers from symptomatic independent pain." As such, it argues that "she is no longer entitled to any impairment under the guides or in need of restrictions." EPI Corporation asserts that Boling has not offered any evidence to contradict Dr. Breidenbach's conclusion.

EPI Corporation has not convinced the ALJ that Boling's previous 25% permanent impairment rating is now 0%. Dr. Breindenbach's conclusions derive from his opinion that either

consciously or unconsciously Boling is malingering. He based his opinion on Boling's performance on a grip test he administered on May 5, 2010. Boling explained why she had difficulty with the grip test at the hearing:

> What it is, is the grip test, it weighs itself, about three to four pounds, and you're supposed to squeeze and then rapidly take it to your other hand, squeeze it and rapidly bring it back. The test was actually difficult for me, for one, for the weight and second because of anything that I do that causes any kind of –like if I squeeze, it activates that where it does cause symptoms, because the RSD and autonomic dysfunction are tied in. So, anything that happens here can actually affect anything in my body with the blood pressure, the headaches, the nausea, the vomiting. So, it's just really difficult for dexterity to get this hand to function as fast as this one does.

There is no indication in the record that Dr. Breidenbach attempted to administer the test again at another time or utilized any other diagnostics to assess the validity of Boling's complaints. This is problematic for this ALJ in light of the mountain of evidence generated over the past several years from various doctors concluding that Boling had RSD. None of these doctors suggested that Boling was malingering.

In fact, the ALJ finds that it would have been difficult, if not impossible, for Boling to fabricate some of the symptoms that the various physicians observed. For example, Dr. Nickerson

noted: “the hair on the right forearm was darker and longer than the left . . . temperature of the skin over the dorsal aspect of the right wrist was 29.3 degrees C and the temperature over the left dorsal wrist in the same area was 31.1 degrees C . . . the skin appeared to be overly moist in the palm of the right hand when compared to the same area in the palm of the left hand.”

Furthermore, in the absence of any further explanation, the ALJ finds Dr. Breindenbach’s conclusion that Boling has a 0% impairment somewhat inconsistent with his deposition testimony. Dr. Breindenbach testified in his deposition that he did not understand POTS and was unable to offer an opinion on the interaction between Boling’s initial injury and her POTS syndrome: “I don’t understand Pott’s[sic] syndrome. So if Pott’s[sic] syndrome can be caused by an injury, or if Pott’s[sic] syndrome can be brought into realization by an injury, that’s a question which that physician should answer. And possibly there’s a relationship between dystrophy and Pott’s[sic] syndrome that I can’t answer. So I can’t say for sure build a fire wall between the injury and Pott’s[sic] because it’s a condition which I don’t understand.”

The ALJ’s understanding of Dr. Nickerson’s (and Dr. Wood) diagnosis is that the initial injury brought Boling’s underlying POTS into a disabling reality. Dr. Nickerson’s impairment rating, which ALJ Smith adopted, was based on a combination of the effects of Boling’s hand injury, RSD and POTS. Even if the ALJ found Dr. Breindenbach’s conclusions convincing with respect to Boling’s

hand injury, the fact remains that he has not offered any opinion on whether her POTS has now resolved and in fact admitted in his prior deposition that he is not qualified to do so.

Boling, on the other hand, introduced a recent report from Dr. Wood. Dr. Wood's opinion is that Boling's RSD and POTS are still active and still causally related to her original injury. Dr. Wood did not believe that Boling's whole person impairment rating had decreased as related to her RSD and POTS. In fact, he noted some increased symptoms of pain and swelling. Unlike Dr. Breindenbach, Dr. Wood worked quite closely with the physicians at Vanderbilt and Cleveland Clinic in attempting to diagnose and treat Boling's POTS.

The ALJ concludes that Boling's original impairment rating assessed at 25% by Judge Smith entails consideration of a complex and rare medical diagnosis and the manner in which Boling's hand injury, RSD as diagnosed at the time, and POTS interact. Dr. Breindenbach is not qualified to offer an opinion on the entire set of diagnoses and their effects on Boling. His opinion then and now is but a small piece of a much larger medical puzzle. Even if the ALJ found his 0% impairment rating as related to the hand convincing, which she does not, this is not medical evidence that sufficiently establishes that Boling no longer suffers from POTS, especially in light of Dr. Wood's opinion that the condition is still present and that her overall impairment rating has not improved.

In short, the ALJ concludes that EPI Corporation did not sustain its burden

> of proof on the issue of whether the prior PPD award should be reduced based on Dr. Breindenbach's 0% impairment rating.

EPI filed a petition for reconsideration arguing the ALJ erred in her interpretation of the medical records. It also argued the ALJ's analysis pursuant to Fawbush v. Gwinn, 107 S.W.3d 5 (2003) is in error. EPI's petition was denied by order issued November 7, 2012.

On appeal, EPI argues the ALJ erred in concluding there was insufficient evidence of a reduction of permanent disability.

EPI bore the burden of proving Boling was no longer entitled to PPD benefits at the rate awarded by ALJ Smith on December 27, 2009. Since it was unsuccessful in that burden, the question on appeal is whether the evidence compels a finding in EPI's favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence which is 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 an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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). In that regard, the ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that 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 other conclusions

or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). With that standard in mind, we find no error.

We believe substantial evidence supports the outcome selected by the ALJ. Although Dr. Breidenbach expressed misgivings regarding his previous appraisals, Dr. Wood's opinions have remained consistent. Likewise, Dr. Breidenbach at no time provided an opinion noting any particular errors in the analyses provided by either Dr. Wood or Dr. Nickerson. We therefore find no error in the ALJ choosing to rely upon those opinions rather than those of Dr. Breidenbach. Therefore a contrary result is not compelled.

The mere fact Boling may be working does not preclude entitlement to PPD benefits. While her situation may have improved to the point she can perform some work, EPI failed to convince the ALJ she had improved to the point she is no longer permanently partially disabled. We are buttressed by the opinion rendered by the Kentucky Supreme Court in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), which held it would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary

or that he was performing at the time of his injury. Likewise, it would be improper to reduce an award of PPD benefits merely because the injured worker is performing some work.

Accordingly, the decision rendered September 21, 2012, and the order ruling on the petition for reconsideration issued November 7, 2012, by the Hon. Allison Emerson Jones, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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