Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 8, 2014

CLAIM NO. 201073734

FANNIE L. CRUSE PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

HENDERSON COUNTY BOARD OF EDUCATION
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Fannie Cruse ("Cruse") appeals from the December 16, 2013 Opinion and Award and the February 14, 2014 Order on Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). The ALJ found Cruse suffered a permanent injury to her left shoulder, but determined she sustained no permanent injury to her right

shoulder, knees, and cervical spine. She awarded Cruse temporary total disability benefits, permanent partial disability benefits, and medical benefits for the left shoulder injury; and medical benefits for the temporary injuries. Cruse appeals, arguing the ALJ erred in finding her injuries were temporary, and in determining she is not totally disabled. Additionally, she argues KRS 342.730(4) is in contravention of federal employment discrimination legislation. For the reasons set forth herein, we affirm.

Cruse was employed as an after-school care and summer care aide for the Henderson County Board of Education ("HCBE"), a position which involved caring for groups of small children. She was injured on October 14, 2010 when she tripped and fell in the playground area of a school. At the time of her injury, she was 71 years old. In her Form 101, she alleged injuries to her "left and right shoulders, bicep, knees, ankle, foot, neck, back and toes."

Methodist Hospital records indicated Cruse presented on October 14, 2010 with complaints of pain in her left shoulder, clavicle, both knees and left foot. She had abrasions on both knees and both arms. A splint cast was applied and Cruse was released in stable condition, but returned four days later with continued left shoulder pain.

A subsequent MRI revealed a full thickness rotator cuff tear in Cruse's left shoulder. The tear was surgically repaired by Dr. Glenn Johnson on November 1, 2010. By February 15, 2011, Dr. Johnson's medical records indicate Cruse had tolerated the surgery well, though she was restricted to lifting no more than five to eight pounds. As to her left shoulder, he placed Cruse at maximum medical improvement ("MMI") on May 12, 2011 and released her to work. On June 3, 2011, Dr. Johnson assigned a 6% whole person impairment rating for the left shoulder condition pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

During the course of his treatment, Dr. Johnson referred Cruse to two other physicians. For knee pain, she was referred to Dr. John Deppe. He noted pre-existing osteoarthritis aggravated by the fall and resulting contusion. He found no meniscal tear and recommended conservative treatment and strengthening exercises. In a follow-up visit on July 7, 2011, Cruse indicated her left knee was improving, but her right knee continued to bother her. X-rays revealed severe patellofemoral arthritis, aggravated by the contusion. He administered an injection.

Cruse was also referred by Dr. Johnson to Dr. Ross Whitacre for evaluation of her neck pain. He diagnosed significant left C3-4 and 4-5 spondylosis with acute chronic flare-up resulting from the fall. He administered an injection in June, 2011. A month later, Cruse reported her neck pain persisted.

Dr. Jules Barefoot conducted an independent medical evaluation ("IME") on July 9, 2013 at Cruse's request. Dr. Barefoot rated cervical, left knee, left shoulder, and right shoulder conditions for a combined 23% whole person impairment pursuant to the AMA Guides. He also found Cruse's carpal tunnel syndrome was due to the workplace fall. Dr. Barefoot predicted she would have marked difficulty kneeling, crouching, crawling, squatting and using her arms above shoulder level.

Dr. Daniel Primm also conducted an IME on August 20, 2013. Based on a medical records review, Dr. Primm noted Cruse's history of chronic neck pain, and rheumatologic disease involving her Achilles tendons, hands and other joints. Following a physical examination, Dr. Primm did not find evidence she had sustained an injury to her cervical spine or either knee. Instead, he opined her neck pain was due to degenerative disease as well as prior motor vehicle accidents, and her knee pain was a result of

degenerative changes. Due to her left shoulder condition, Dr. Primm assigned a 7% whole person impairment rating pursuant to the AMA Guides. He found her to be at MMI as of the date of examination, and released her to work with a recommendation to avoid heavy lifting above shoulder level.

Additional medical evidence concerning non-work-related conditions was introduced. Dr. James O'Neill evaluated Cruse on November 7, 2012 for Achilles tendonitis and right foot pain, at which time she reported dropping an object on her right foot resulting in bruising. Dr. Moges Sisay evaluated Cruse on April 5, 2011. Dr. Sisay's records indicate a history of muscle cramps in her hands and feet, and polymyalgia rheumatoid. Finally, emergency room records from Methodist Hospital document a visit on December 4, 2012, following an automobile accident in which Cruse was the driver of a car which was rear-ended. She reported neck pain following this minor collision.

The ALJ ultimately determined Cruse sustained an injury to her left shoulder, resulting in a 7% whole person impairment rating pursuant to the AMA Guides. She relied on Dr. Primm's report to conclude Cruse suffered no permanent injury to any body part other than the left shoulder. She further concluded the left shoulder injury would not prevent Cruse from returning to work. The ALJ

awarded Cruse temporary total disability benefits, permanent partial disability benefits and medical benefits for the left shoulder injury, and medical benefits for the temporary injuries to her right shoulder, bicep, knees, ankle, foot, back, neck and toes.

Both parties petitioned for reconsideration. Cruse's petition, which the ALJ deemed an impermissible re-argument of the merits of the claim, was denied. The HCBE's petition was granted and, in her Order on Reconsideration, the ALJ corrected certain errors which do not relate to the arguments raised in this appeal. Cruse now appeals, raising three allegations of error.

Cruse first argues the ALJ erred in failing to find permanent injuries to her cervical spine, knees and right shoulder. In addition to claiming the evidence compels a contrary result, Cruse avers the ALJ incorrectly applied the law to her pre-existing conditions. We begin by noting Cruse, as the claimant, bore the burden of proof of each element of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in establishing a permanent injury to her cervical spine, knees, and right shoulder, the question on appeal is whether the evidence compels a different result.

Dr. Primm's report, relied upon by the ALJ, constitutes the requisite substantial evidence to support the determination Cruse suffered only temporary injuries to her cervical spine, knees, and right shoulder. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Also, as noted by the ALJ, Cruse suffered from degenerative conditions in her knees and neck, as supported by the medical records of Drs. Whitacre and Deppe. While evidence exists in the record supporting a contrary conclusion, namely Dr. Barefoot's report, this proof is not so overwhelming to compel any particular result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The ALJ acted well within her discretion in choosing to rely upon Dr. Primm's report, and sufficiently articulated her reasons for doing so.

Furthermore, we disagree with Cruse's assertion the ALJ failed to evaluate the medical proof regarding pre-existing conditions. In her brief to this Board, Cruse emphasizes any pre-existing condition in her neck and knees were asymptomatic. In her summary of Dr. Deppe's records, the ALJ noted Cruse's pre-existing osteoarthritis in her knees, which was aggravated by the contusion. She also acknowledged Dr. Whitacre's diagnosis of degenerative disease in the cervical spine, aggravated by her work-related fall. Thus, the ALJ accepted Cruse's conditions

were asymptomatic. She was simply not convinced that the work-related accident produced any permanent injury. As explained above, she acted within her discretion in relying on Dr. Primm's report which supports this conclusion.

As to Cruse's right shoulder condition, we cannot agree the ALJ wholly disregarded her history of right shoulder problems. Dr. Primm's report recounted Cruse's prior right rotator cuff repair that had healed months before the work accident. Following her fall at work, Cruse first reported right shoulder pain some two months after the accident. Dr. Primm also evaluated Cruse and recorded range of motion measurements of her right shoulder. He concluded only Cruse's left shoulder injury resulted in a permanent impairment. By stating her reliance upon Dr. Primm's report, the ALJ adequately apprised the parties of the basis of her conclusion that the work accident resulted in no permanent impairment to Cruse's right shoulder.

Cruse next argues the evidence compels a finding of total disability, or a finding she could not return to her job. The ALJ explained:

> After careful review of all the medical evidence and the testimony of Cruse, it is clear she has many long standing problems and many degenerative changes which were not brought on by the work

> injury. Dr. Primm is found most persuasive. While Dr. Barefoot's report and deposition have been considered, his opinion is not convincing as he attributes so much of Cruse's complaints, even carpel tunnel syndrome, to the work injury. Clearly Cruse suffered a hard fall at work resulting in multiple injuries, most temporary. Only the shoulder injury is found to have resulted in permanent injury with the other injuries resolving completely to the pre-injury state within the following year. Furthermore, based on Cruse's shoulder condition alone, she could return to her former job. While Dr. Primm noted a few lifting restrictions and discussed those in his deposition, there is no proof this restriction would prohibit her from returning to work.

"Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work. KRS 342.0011(11)(b). In concluding Cruse is permanently partially disabled, the ALJ relied on Dr. Primm's impairment rating, as well as his opinion that Cruse's left shoulder had returned to its pre-injury state and his recommended lifting restrictions. Furthermore, in the summary of Cruse's testimony, the ALJ recounted her work history, education, age, and her post-injury level of activity at home. Likewise, the ALJ stated her consideration of Cruse's many other non-work-related

physical conditions. When her opinion is read in its entirety, it becomes evident the ALJ considered the factors enunciated in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The ALJ was presented with conflicting medical evidence concerning a worker of advanced age with several, non-work-related physical conditions. In such circumstances, the discretion lies with the ALJ to select which evidence upon which to rely, and to draw rationale conclusions from the proof. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). "Compelling evidence" is defined as evidence that 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001). When viewed in its totality, we cannot agree the evidence compels a finding Cruse is permanently totally disabled or unable to return to her pre-injury position. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Finally, in a largely undeveloped argument, Cruse asserts KRS 342.730(4), which limits entitlement to income benefits when an employee qualifies for Social Security retirement benefits, violates the federal Age

Discrimination in Employment Act. 29 U.S.C. §623. HCBE responds this Board lacks jurisdiction to consider the constitutionality of a statutory provision. At the outset, we disagree with HCBE that Cruse has raised a constitutionality argument. Rather, she argues the statute contravenes federal law.

However, we also disagree with Cruse that KRS 342.730(4) violates 29 U.S.C.§623(a)(1), which prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." KRS Chapter 342 is a system of compensation mandated by the state, not the employer. Thus, even assuming *arguendo* KRS 342.730(4) is discriminatory, we are not convinced such action can be imputed to the employer as it is not within the employer's control. Furthermore, we are not persuaded Kentucky's workers' compensation scheme constitutes "compensation, terms, conditions or privileges of employment" within the meaning of the federal statute. Income benefits do not fall within this class because it is compensation for an injury, not a benefit of employment.

For the foregoing reasons, the December 16, 2013 Opinion and Award and the February 14, 2014 Order on

Reconsideration rendered by Hon. Jane Rice Williams, are hereby **AFFIRMED**.

ALL CONCUR.

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