OPINION ENTERED: JANUARY 18, 2013

CLAIM NO. 201183490

FIRST CORBIN LONG TERM CARE, INC. PETITIONER

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

CORDIE GAMBREL
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. First Corbin Long Term Care, Inc. ("Corbin") appeals from the July 2, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), and from the July 19, 2012 Opinion and Order on Reconsideration. The ALJ found Cordie Gambrel ("Gambrel") permanently totally disabled as a result of a June 26, 2011 injury. On appeal, Corbin argues the award of permanent total disability ("PTD") benefits is not supported

by substantial evidence and is not in conformity with the law. We disagree and affirm.

Gambrel filed a Form 101, Application for Resolution of Injury Claim, on December 19, 2011, alleging she injured her back on June 26, 2011, while pulling a food cart on and off an elevator.

Gambrel testified by deposition on March 9, 2012 and at the hearing held June 25, 2012. She completed the ninth grade and later obtained a GED. Her vocational history includes working in a grocery store, cleaning offices, house-parenting in a children's home, and working as a dietary aide for Corbin. Her job duties with Corbin included preparing snacks and desserts, washing dishes, pulling food carts, sweeping, mopping and cleaning the kitchen.

Gambrel testified that on July 26, 2011, as she pushed and pulled the cart into the elevator, she felt a popping sensation in her back. She reported the injury to her supervisor but was able to finish her shift with assistance from coworkers. Gambrel stated she worked another week and was then unable to perform her job any longer. Gambrel stated she was not working under any restrictions at the time of her work injury and denied any previous problems with her back. Gambrel admitted she had a previous shoulder

injury in 2006, for which she was seen by a chiropractor and an orthopedist.

Gambrel testified she continues to have pain in her back which is made worse by standing for long periods of time. She testified she now has trouble sweeping the floor and is only able to occasionally wash dishes or do laundry. Most of the time she spends in a recliner. Gambrel indicated she can no longer perform her job duties at Corbin because of her inability to stand, pull and lift.

At the hearing, Gambrel testified she continues to have problems with her lower back and pain into her left leg, made worse by doing any kind of house work, standing or walking. She indicated she could not return to her job with Corbin, nor could she perform any of her past jobs. Gambrel stated she was not actively treating with a physician immediately prior to the June 2011 injury. The only medication she was taking at that time was for her thyroid condition.

On cross-examination, Gambrel indicated she had received some treatment for her lower back “years ago” but stated she was only off work for a few days. Gambrel indicated she saw Dr. Samuel Combs for her shoulder condition in 2009. She did not remember past treatment with Dr. Combs other than treatment related to her shoulder or

when she hurt her back and was off for “a little while.” Gambrel stated she disputes Dr. Combs’ records regarding treatment from 2010 through May 2011. Gambrel could not remember having an MRI performed in September 2010. She stated the pain in her back was on the left side on the back of the shoulder. She stated she had no lower back symptoms prior to her June 26, 2011 work injury.

Gambrel introduced a brief questionnaire completed by Dr. Larry Warren, who had been treating Gambrel for one year. He opined Gambrel was incapable of returning to work and he assigned restrictions, including no lifting over ten pounds and no pushing or pulling.

Gambrel introduced the report of Dr. Ronald Dubin, who evaluated her on January 23, 2012. Dr. Dubin recorded a history of the June 26, 2011 injury. He reviewed the MRI report of Dr. Paul Ellis and conducted a physical examination. Dr. Dubin’s impression was a low back injury of the lumbosacral spine with multilevel disc degeneration. He concluded Gambrel was at maximum medical improvement (“MMI”) and assigned a 6% whole person impairment based upon the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). He also concluded Gambrel could not return to her past work and should be restricted to sedentary duty.

Corbin submitted the April 19, 2012 report of Dr. David Muffly. Dr. Muffly reviewed medical records and diagnostic studies and concluded Gambrel had a resolved lumbar strain as a result of the June 26, 2011 work injury. He opined Gambrel had pre-existing lumbar degenerative disc disease and osteoarthritis that were actively treated by Dr. Combs prior to her work injury. Dr. Muffly stated Gambrel had no impairment related to the work injury and there was no worsening of her lumbar condition noted on the August 4, 2011 lumbar MRI when compared to the September 27, 2010 lumbar MRI. Dr. Muffly indicated Gambrel retained the physical capacity to return to her past work and did not need restrictions or additional treatment for the work injury.

Dr. Muffly stated he had reviewed the reports of Dr. Sheridan and Dr. Dubin. He agreed with the conclusions of Dr. Sheridan. Dr. Muffly disagreed with the impairment rating assigned by Dr. Dubin, who did not record any past history of low back pain prior to the work injury and had not reviewed the September 27, 2010 MRI.

Corbin introduced the December 6, 2011 report and April 10, 2012 addendum of Dr. Richard Sheridan. Gambrel gave a history of the work incident and reported complaints of intermittent pain in the left episacral area and

intermittent pain and paresthesias in the left lower extremity. Dr. Sheridan reviewed lumbar and thoracic MRI scans taken on August 4, 2011, which revealed bulging discs at L3-4, L4-5, and L5-S1, as well as degenerative changes in the mid spine area. Dr. Sheridan diagnosed acute thoracolumbar strains, resolved, as a result of the work injury. He stated the diagnosis was a direct result of, and was brought into disabling reality by, the June 26, 2012 work-related injury. He opined Gambrel had reached MMI and could be released to work without restrictions. He did not recommend additional treatment for the work-related condition. Dr. Sheridan placed Gambrel in DRE category I and assigned a 0% permanent impairment pursuant to the AMA Guides.

In his addendum, Dr. Sheridan reviewed Dr. Dubin's January 23, 2012 report and saw nothing in Dr. Dubin's exam that merited a 6% impairment rating. Dr. Sheridan reiterated that Gambrel should be placed in DRE category I and assigned a 0% impairment rating.

Corbin filed medical records from Tri-County Chiropractic reflecting treatment from August 26, 2009 through May 4, 2011. Gambrel was treated on August 26, 2009 for pain in her shoulder, neck and back that began "3 years ago" as a result of a work accident on "11-07." The diagram

in the initial record does not indicate Gambrel had pain in the lower back. Dr. Combs provided off work excuses from September 9, 2009 through September 12, 2009, July 26, 2010 through July 29, 2010, September 16, 2010 through October 11, 2010, and March 9, 2011 through March 13, 2011. Gambrel received chiropractic manipulation, electric stimulation and ultrasound therapy on multiple occasions.

Gambrel filed records from Dr. Combs showing treatment from June 30, 2011 through July 21, 2011. Gambrel reported symptoms beginning on June 26, 2011 due to her work injury. Dr. Combs' diagnostic impression was sprain/strains of the lumbar spine and lumbosacral spine, acute. Dr. Combs provided off-work excuses from July 5, 2011 through July 18, 2011.

In his July 2, 2012 Opinion and Order, the ALJ stated in part as follows:

> **2. Did the plaintiff have an active pre-existing condition?** The defendant argues that the plaintiff's continued symptoms resulted from pre-existing degenerative changes. The plaintiff argues that she had no symptoms, treatment or difficulty doing her job.
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> The phrase "active disability" does not appear in statutes but is a term developed by case law. In *Haycraft v. Corhart Refractories Co.*, 544 S.W.2d 222 (Ky. 1976), the Supreme Court stated that a pre-existing

condition or disease was "active" if it had become "disabling" prior to the subsequent accident. On the other hand, in *Yocom v. Spaulding*, 547 S.W.2d 442, 445 (Ky. 1977), the Courts defined a "dormant" condition or disease as one which had not created any occupational disability prior to the subsequent accident.

In the present case the ALJ finds most persuasive the opinion of Dr. Dubin, as supported by the absence of prior treatment for any complaints of pain in the affected areas. I therefore find that the plaintiff did not have an active pre-existing condition.

3. What is the extent and duration of the plaintiff's permanent impairment? The plaintiff argues that she sustained a 6% whole person impairment and lacks the capacity to perform her pre-injury job. The defendant argues that the plaintiff sustained no impairment.

In rendering a decision, KRS 342.285 grants the ALJ 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). In the present case the ALJ finds most persuasive the opinion of Dr. Dubin. Further consistent with Dr. Dubin's well-reasoned opinion, the ALJ finds that the plaintiff lacks the capacity to perform her pre-injury job.

"'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,
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> > "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."
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> Id. at 52. (Internal citations omitted.) Also, a worker's testimony is competent evidence of his physical condition and of her ability to perform various activities both before and after being injured. Id; see also, *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).
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> In the present case, the ALJ considers the plaintiff's age, her injury, and her lack of education and transferrable skills. The ALJ finds that as a result of the plaintiff's work injury, she is now permanently and totally disabled.

On July 13, 2012, Corbin filed a petition for reconsideration arguing the ALJ's statement that there was

an “absence of prior treatment for any complaints of pain in the affected areas” was factually inaccurate. Corbin noted the treatment records of Dr. Combs and the MRI report from Baptist Regional Medical Center establish Gambrel had prior medical treatment for complaints of pain in the affected areas. Corbin also requested that the ALJ provide an additional explanation as to why the triple multiplier was not more appropriate given that Gambrel filed evidence of the lowest and most minimal impairment rating for low back pain under the DRE section of the AMA Guides. Corbin also noted Gambrel had obtained a GED, an achievement inconsistent with a finding of “limited education.”

The ALJ issued his Opinion and Order on Reconsideration on July 19, 2012. In denying the petition, the ALJ found as follows:

> 4. Based on the clear and convincing evidence contained in Dr. Dubin’s medical report to the effect that the plaintiff will sustain a 6% permanent impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, I made the factual determination that the plaintiff did sustain a permanent injury as a result of her low back injury while working for the defendant-employer.
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> 5. The correct standard regarding a carve-out for pre-existing active condition is set forth by the Court of Appeals in Finley v. DBM Technologies,

> 217 S.W.3d 261 (Ky. App. 2007). In Finley, supra, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both *symptomatic* and *impairment ratable* pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. Finley v. DBM Technologies, supra.
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> 6. Based upon the plaintiff's testimony that prior to her work injury she had no work restrictions and no difficulty performing her job, I made the factual determination that she did not have a pre-existing occupational disability under the Finley case.
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> 7. Based upon the plaintiff's testimony at the hearing that she continues to have daily pain in her low back, which runs down into her left leg, and which greatly limits her physical activities, and the clear and convincing medical report of Dr. Dubin as to her physical and functional impairment, the holding of the Kentucky Supreme Court in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), and considering the plaintiff's age, injury and lack of education and transferable skills, I made the factual determination that she is now totally and permanently disabled.

On appeal, Corbin argues the award of PTD benefits is not supported by substantial evidence. Corbin contends the ALJ provided no analysis of the medical evidence dated prior to June 26, 2011 or of the causation evidence. Corbin notes the September 27, 2010 lumbar MRI scan documented the same condition prior to the work event that formed the basis of

the ALJ's finding of PTD. Additionally, Corbin observes the treatment notes of Dr. Combs establish he treated Gambrel on eighteen occasions for back pain, including a visit on May 4, 2011, only six weeks before the alleged work injury. Corbin notes Dr. Muffly found only a temporary strain as a result of the work incident which resolved without permanent impairment. He also commented the lumbar disc disease and osteoarthritis pre-dated the work injury. Likewise, Dr. Sheridan stated Gambrel sustained a strain which had resolved. Corbin once again takes issue with the ALJ's statement that there was an "absence of prior treatment for any complaints of pain in the affected areas."

Corbin argues the ALJ failed to make findings concerning defects in Dr. Dubin's report. Corbin asserts Dr. Dubin's report does not indicate he was given a history of the 2010 lumbar MRI and he never addressed the causation issue, nor did he address whether there was an active pre-existing condition. Corbin contends it appears Gambrel was acting with deceit in keeping a correct history from Dr. Dubin. Corbin asserts Dr. Dubin was unaware of the pre-existing condition. Pursuant to the holding in Cepero v. Fabricated Metals, 132 S.W.3d 839 (Ky. 2004), Corbin argues Dr. Dubin's report does not constitute substantial evidence.

Since Gambrel, the party with the burden of proof, was successful before the ALJ, the issue on appeal is whether the ALJ's decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same parties' total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show there was some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Consideration of a total disability award depends on many of the same factors enunciated in Osborne v. Johnson, 432 S.W. 2d 800 (Ky. 1968). It remains within the broad authority of the ALJ to translate an impairment rating into either partial or total disability. Ira A. Watson

Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The factors which the ALJ may consider in making the determination include the worker's post-injury physical, emotional, intellectual and vocational status and how those factors interact. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001). Furthermore, as recognized by the ALJ, the ALJ may rely on both the medical testimony and a worker's self-assessment of ability to labor. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

Therefore, for Gambrel to meet her burden of proving entitlement to total occupational disability benefits, she first had to prove an impairment rating pursuant to the AMA Guides, and second, that she sustained a complete and permanent inability to perform any type of work as a result of the injury. See Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001). So long as that determination is supported by substantial evidence, the ALJ's finding on the issue of Gambrel's total occupational disability cannot be disturbed on appeal. Special Fund v. Francis, supra.

In this case, the ALJ sufficiently explained why he found Gambrel is permanently totally disabled as a result of the work injury. The ALJ correctly determined there was no evidence of an impairment rating prior to the work

injury. While there is evidence of some symptomatology prior to the work injury, there is simply no basis to find Gambrel's low back condition was impairment ratable immediately prior to the work injury.

The medical evidence was conflicting as to whether Gambrel, post-injury, had a ratable condition as a result of the lumbar injury. Dr. Sheridan and Dr. Muffly agreed Gambrel sustained a lumbar strain as a result of the work injury but believed the condition had resolved. Conversely, Dr. Dubin believed Gambrel's condition warranted a 6% permanent impairment rating. The ALJ was well within his authority as fact-finder in determining Gambrel had a permanent impairment rating following the injury.

On reconsideration, the ALJ explained he made the finding Gambrel had no pre-existing occupational disability pursuant to Finley based on her testimony that she had no work restrictions and no difficulty performing her job prior to the work injury. Corbin points to no evidence establishing Gambrel's pre-injury condition resulted in occupational disability. Gambrel testified the effects of her low back condition now preclude her from performing the types of work she performed in the past. She stated standing and minimal house work made her condition worse.

She stated her limitations on standing, pulling and lifting would prevent her from performing her job with Corbin. Dr. Dubin indicated Gambrel would be limited to sedentary work. Given the restriction by Dr. Dubin and accepting Gambrel's testimony regarding her abilities combined with her age and intellectual abilities, we cannot say the ALJ's conclusion that Gambrel is permanently totally disabled is clearly erroneous. Substantial evidence supports the ALJ's conclusion Gambrel is permanently totally disabled as a result of the work injury.

Accordingly, the July 2, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge, and the July 19, 2012 Opinion and Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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