OPINION ENTERED: APRIL 13, 2012

CLAIM NO. 200976944

FRESENIUS MEDICAL CARE HOLDING, INC. PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

KEITH NELSON
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Fresenius Medical Care Holdings, Inc. ("Fresenius") appeals from the October 12, 2011 Opinion, Order and Award rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"), finding Keith R. Nelson ("Nelson"), permanently and totally disabled and awarding him income benefits accordingly. Fresenius also appeals

from the ALJ's November 14, 2011 Order overruling its petition for reconsideration.

Nelson filed an application for resolution of injury claim on March 28, 2011, alleging that, on May 14, 2009, and again on September 26, 2009, he had been injured while working for Fresenius. On May 14, 2009, Nelson indicated that, as he was opening a large box, a staple cut the middle and ring fingers of his left hand requiring several stitches. On September 26, 2009, Nelson asserted he was injured in a motor vehicle accident. The May 14, 2009 injury resolved and is not the subject of this appeal.

Nelson testified by deposition on July 7, 2011 and again at the formal hearing. Nelson, now age 48, lives in Totz, Kentucky. He completed high school with a vocational school certificate in "Health Education". He also has a commercial driver’s license. After he began working for Fresenius in 2004, Nelson completed a training program qualifying him as a dialysis technician.

Nelson's past employment history included work at Pizza Hut, McDonald's and Pepsi-Cola. He has also worked as a truck driver and security guard. Nelson's job duties at Fresenius included repairing dialysis equipment and general maintenance on dialysis facilities. Nelson’s duties also included climbing, bending, stooping, pushing, pulling,

prolonged sitting, prolonged standing, extended reaching, crouching, kneeling, crawling and handling. At times he was required to lift and move equipment weighing up to 100 pounds individually and 300 pounds with assistance.

Nelson testified he was driving to the Hazard Clinic on September 26, 2009 on State Route 80 in a rainstorm when his vehicle hydroplaned and went off the road into a ditch. When the vehicle came to rest, Nelson began experiencing pain and stiffness in his lower back. Emergency personnel were called, but Nelson declined medical treatment. However, Nelson's pain symptoms worsened and he went to the emergency room at Harlan Appalachian Regional Hospital ("ARH") the next day. He was provided pain medication and, later, referred to a treating physician, Dr. Jackson.

Nelson's symptoms persisted, requiring surgical decompression of the sciatic nerves in early 2010. He has also undergone epidural injections, physical therapy, and continues to take medications including Lortab 7.5, Zanaflex, Neurontin, Remeron and Synthroid. Nelson described his present medical condition to the ALJ as follows:

> Q. Now, as a result of the pain you are having and your injury, what problems are you having, tell the judge, physically?

A. I have trouble walking.

Q. What problems do you have with walking?

A. I start having sharp pains. I make it about 100 foot [sic] and it's real bad. I will trip over my right leg, my right foot, I'll fall into things.

Q. Do you have a problem with sitting?

A. Usually I can sit ten, 15 minutes, and then I have to get up.

Q. Why do you have to get up?

A. I start having sharp pains.

Q. Sharp pains where?

A. In the lower back and in the right butt cheek.

Q. Standing - how long can you stand before the pain gets severe?

A. 15 minutes.

…

Q. What problems do you have with riding in an automobile?

A. Both my legs try to fall asleep.

Q. What about pain?

A. And I have severe pain in my lower back and legs.

Q. Your job with Fresenius Medical Care Holdings in this claim, did it involve a lot of driving?

A. Yes, it did.

Q. And repetitive bending, stooping, crouching and crawling?

A. Yes.

Q. And are you able to take a bath in a bathtub?

A. No.

Q. Why not? Tell the Judge.

A. My wife is not big enough to help me get out of it.

Q. Why do you need help getting out of it?

A. Because once I get down in that position I can't get back up.

Q. I notice you are having to use a cane today?

A. Yes, Sir.

Q. How often do you use a cane?

A. 90% to 100%.

Q. Who prescribed the cane?

A. Doctor Stevens.

Q. The same doctor who did your surgery?

A. Yes.

Q. Does Doctor Jackson also monitor your medications as far as refills and things like that?

A. Yes, he does.

Q. Are you having any problems with your nerves or depression?

A. Yes.

Q. Tell the judge what problems you are having with nerves and depression.

A. I have a six-year-old daughter and I'm not able to get in the floor and play with her and she sits there and she cries. And I've actually thought more than once that it would be better if I was gone, you know. I've contemplated killing myself more than once but, you know, where I go to church and everything I realized that is not something I need to do but it's still there, it still lingers.

Q. Does it bother you to be around a group of people?

A. Yes.

Q. What problems do you have with that?

A. It gets me depressed where I see them mingling in crowds and walking and lots of times I have to lean against the wall, I got to sit, or I've got to stand, lean on my cane. You know, I have a hard time.

Q. If you were able to work would you be back at work?

A. Yes.

Q. Did you enjoy your job?

A. I loved my job.
(Errors in original.)

Nelson submitted the medical report of Robert C. Hoskins, M.D., who conducted an independent medical examination ("IME") on June 13, 2011. Dr. Hoskins recorded

a medical history that Nelson had been involved in a work-related motor vehicle accident on September 26, 2009. In addition, Dr. Hoskins reviewed medical records from Dr. Midkiff and Dr. Stephens and conducted a physical examination. Dr. Hoskins diagnosed "S/P L5-S1 decompression with foraminotomy (02–02–10), lumbosacral strain/sprain, right S1 radiculopathy, and lumbar degenerative disc disease."

Dr. Hoskins concluded the work-related motor vehicle accident of September 26, 2009 was likely a substantial contributing factor to the disc protrusion at L5-S1 and also aroused Nelson's previously dormant and non-disabling lumbar degenerative disc disease, spinal stenosis, and facet arthropathy into disabling reality.

Dr. Hoskins assigned a 13% whole person impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He also indicated Nelson had no active impairment prior to the injury. Dr. Hoskins assigned the following restrictions:

1. No lifting greater than 25 pounds;
2. No lifting greater than 15 pounds below waist level;
3. No prolonged or repetitive overhead work;
4. No continuous sitting for more than 90 minutes. Plaintiff needs 10-15 minutes to stand and walk around

after 90 minutes of continuous sitting;

5. No continuous standing or walking greater than 45 minutes. Plaintiff needs 10 to 15 minutes to sit after 45 minutes of continuous standing and/or walking.
6. No prolonged or repetitive stooping or crouching.
7. No heavy pushing, pulling, or carrying.
8. No prolonged or repetitive use of equipment that subjects the spinal cord to vibration.
9. No activities that involve sustained posturing of the lumbosacral spine at extremes of motion or repetitive movements into extremes of lumbosacral motion.

Dr. Hoskins reviewed Nelson's job requirements and stated:

> Mr. Nelson's former job involved general maintenance of facilities and maintenance of all dialysis equipment across Eastern Kentucky--overall, he had 3-4 clinics, but he assisted with about 7 others. Such work required extensive driving and various physically demanding postures and activities such as stooping, lifting up to 50 pounds, climbing, pushing, pulling, prolonged sitting, prolonged standing, extended reaching, crouching, kneeling, and handling.

Based upon these requirements, Dr. Hoskins determined Nelson did not retain the physical capacity to return to the type of work he performed at the time of his injury.

Nelson submitted a medical report from Philip Corbett, M.D., who conducted an IME on August 12, 2010. Dr. Corbett recorded a history that Nelson was a dialysis technician

whose job involved driving between various dialysis clinics throughout eastern and central Kentucky. On September 26, 2009, as Nelson was driving to one of those clinics, his vehicle hydroplaned, leaving the roadway and crashing into a ditch. Nelson sought treatment the next day at Harlan ARH where he was given prescriptions for pain medications and referred to his primary care physician, Dr. Jackson. Nelson was then referred to Dr. Stephens who performed a surgical decompression and L5-S1 on February 2, 2010.

Nelson reported he continued to have significant back pain and some continuing leg pain despite medications and surgery. In addition, Nelson believed he was developing some atrophy in his buttocks.

Dr. Corbett conducted a physical examination, noting Nelson frequently changed sitting positions due to his "described pain at the right lumbosacral junction into the right buttocks and the back of the right side." Dr. Corbett also noted Nelson walked "with a decided antalgic, even Trendelenburg type gluteus medius lurch." Dr. Corbett diagnosed:

> Low back pain and right leg radicular pain of a dermatomal distribution status post L5-S1 hemilaminotomy and discectomy. There is evidence of motor weakness of the right foot appropriate for the level described in the surgical procedure. The patient has some degree

> of significant right buttock atrophy in addition to the atrophy of the lower extremity without evidence of loss of motion segment integrity, but with a suggestion of possible involvement of the L3-4 nerve root. This is in addition to the obvious S1 nerve root distribution. This would correspond with a DRE Lumbar Category III impairment of the whole person utilizing Table 15-3 of the Fifth Edition of the AMA Guides, page 384 and 13% of the whole person.

Nelson submitted the medical records from G. Christopher Stephens, M.D., his treating surgeon. Those records show Dr. Stephens followed Nelson's progress from November 6, 2009 through July 20, 2010. In November, Dr. Stephens administered epidural shots to Nelson. At his December 10, 2009 follow-up appointment, Nelson advised Dr. Stephens the shots gave him some benefit, "however, not a tremendous amount." He still complained of back pain symptoms radiating into his right leg.

Dr. Stephens performed a surgical decompression and foraminotomy at L5 and S1 on February 2, 2010. Nelson returned for follow-up on March 5, 2010 and advised that, although his leg pain was much improved from surgery, he still had numbness in his leg and a moderate amount of back pain as well. Over the course of the next several months Nelson made only modest improvements. Dr. Stephens stated:

> Mr. Nelson is clearly going to have some residual long-term pain with this. I do

> not believe he is ever going to be able to travel long distances on a routine basis to perform his job as a dialysis technician. I do believe he could perform the duties of this as long as it did not require significant driving. Having said that, I am going to let him go back to work as of Monday to his occupation with the restriction of no driving greater than 30 miles to and from his place of work. The driving and sitting cause marked exacerbation of his pain.

Dr. Stephens released Nelson to return to work on July 19, 2010, but restricted lifting to no more than 15 pounds.

Dr. Robert Granacher conducted an IME of Nelson on July 12, 2011 at Fresenius's request. Nelson first completed a 22 page medical history. Dr. Granacher and his staff then interviewed Nelson and administered a battery of psychological tests. Nelson reported he lived with his wife and child and was no longer employed. Nelson recounted the work-related injury incidents of May 14, 2009 and September 26, 2009. Concerning the September 26, 2009 work injury incident, his present symptoms and concerns included weight gain, fatigue, change in appetite, changes in vision, changes in hearing, ringing in his ears, ear pain, discharge from his ears, depression, sadness, loss of memory, irritability, excess handwashing, numbness, tingling, weakness, poor balance, loss of reflexes, mid back pain, low back pain, and difficulty staying awake. In addition, he

had suicidal thoughts but with no plan to specifically harm himself.

Dr. Granacher's staff noted:

> Mr. Nelson appeared to be in a moderate amount of physical discomfort secondary to back and leg pain. His gait was noted to be awkward and he ambulated with a prominent limp. When queried, he indicated that this was due to muscle atrophy as a result of his back surgery. He indicated he had taken no pain medication today because of the side effects. At the end of the evaluation he rated his overall pain level a "9" on a ten point scale.

Based upon the results of testing and the psychiatric examination, Dr. Granacher diagnosed mood disorder and major depression due to pain associated with a physical injury on September 26, 2009. He stated the following conclusions:

> 1. In my opinion, within reasonable medical probability, immediately **prior** to the alleged work-related accident of September 26, 2009, Keith Nelson had a 0% psychiatric impairment based on *Guides to the Evaluation of Permanent Impairment,* 5th Edition, Chapter 14, and *Guides to the Evaluation of Permanent Impairment,* 2nd Edition, Chapter 12, American Medical Association.
>
> 2. In my opinion, within reasonable medical probability, Keith Nelson has a 10% impairment due to the alleged work-related accident of September 26, 2009, based on *Guides to the Evaluation of Permanent Impairment,* Fifth Edition, Chapter 14, and *Guides to the Evaluation of Permanent Impairment,* 2nd Edition,

> Chapter 12, American Medical Association.
>
> 3. In my opinion, within reasonable medical probability, Keith Nelson does not require psychiatric restrictions upon job performance.
>
> 4. In my opinion, within reasonable medical probability, Keith Nelson has the mental capacity to engage in any work he is trained, educated, or experienced to perform.

Dr. Granacher opined Nelson's prognosis was good if he could get adequate treatment for depression. He further opined the Remeron medication Nelson's family physician had prescribed should be set at a dosage between 30 mg and 45 mg daily.

Henry Tutt, M.D., conducted an IME on August 17, 2011 on behalf of Fresenius. Nelson related a history consistent with that summarized above. Nelson’s major complaint was constant low back pain. He further described his leg pain as intermittent but on a daily basis. Dr. Tutt noted Nelson was well-developed and appeared healthy. Nelson had a normal sitting station but when standing and walking assumed "an unusual posture, slightly flexed forward and leaning to the right, alleging difficulty straightening out." Nelson had no difficulty removing his shoes or getting onto or off the examining table.

During the spine and neurological examination, Dr. Tutt noted that, when Nelson stood in an erect posture with his feet close together, his lumbar paraspinal muscles were soft and supple and he had no guarding or scoliosis. He was able to demonstrate a fairly full range of left and right lateral flexion and demonstrated forward flexion to the extent that he came within eight or nine inches of touching his toes, retaining supple lumbar paraspinal muscles and developing a gentle curvature to his lower lumbar region. Dr. Tutt observed Nelson "alleged severe pain, and demonstrated great slowness, however, on achieving an ever-expanding posture from that forward flexed position." Nelson also "moved slowly, hesitantly and deliberately then there's an inability to walk on the toes because of the numbness of his right foot."

Dr. Tutt provided the following opinion:

> In the opinion of the undersigned, based on the information thus far reviewed, there is no evidence that Mr. Nelson sustained any alteration of the structural integrity of his lumbar spine subsequent to the motor vehicle accident described as occurring on 9/26/2009. Following that event, Mr. Nelson had primarily low back pain, with diffuse nondermatomally distributed leg complaints in the presence of a normal musculoskeletal and neurological examination as indicated by the examination of his primary care physicians, Dr. Johnson and Dr.

> Echeverria, and even his eventual treating orthopedic surgeon. His initial lumbar spine x-ray showed long-standing degenerative changes even manifest by narrowing of the L4-5 and L5-S1 disc spaces and an MRI scan revealed changes only consistent with multilevel long-standing degenerative changes non-indicative of nerve root compression. In the opinion of the undersigned, there was minimal indication for operative intervention and it is not therefore surprising that very little was gained from operative intervention, Mr. Nelson actually experiencing broadening of his complaints following surgery, in spite of retention of the normal musculoskeletal and neurological examination. Poor outcomes, in terms of symptom expression, are the expected norm when operative indications are extremely submaximal. A subsequent Functional Capacity Evaluation has indicated performance inconsistencies and self limitations, as does his post operative objective musculoskeletal examination. In the opinion of the undersigned, Mr. Nelson had no indication for operative intervention, has no psychologic basis for his present ongoing persistent symptoms, shows no indication for continuing narcotic analgesics, and is considered as capable, after a unilateral L5-S1 mesial fasetectomy [sic], of performing his usual job duties as he was on the day prior to the motor vehicle accident occurring.

Nelson also relied upon a report from Reba Moore, Psy.S, who evaluated him on May 18, 2011, for support of his psychological claim. She administered objective psychological tests and noted Nelson had an IQ of 109,

which falls within the average range of intelligence. He achieved an eighth-grade rating on the arithmetic portion of the WRAT-3. Moore indicated the test results showed atypical features, which indicated a depressive component and withdrawal tendencies. She stated Nelson was experiencing a significant level of depression. His ability to persist during the course of a work day was significantly impaired by his depression and irritability due to chronic pain. He was diagnosed as suffering from mood disorder, due to chronic pain with major depressive features. Moore opined Nelson's problems were caused by the motor vehicle accident. Moore stated Nelson had a 10% impairment according to the AMA Guides due to depression.

From his review of the evidence, the ALJ concluded Nelson was permanently totally disabled setting out his rationale in the following discussion:

> The ALJ has the sole discretion to determine the quality, character and substance of the evidence and to draw reasonable inferences from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).
>
> The ALJ has the sole authority to judge the weight to be afforded the testimony of a particular witness. McCloud v. Beth-Elkorn Corporation, Ky., 514 S.W. 2d 418 (1985).
>
> Extent and duration is the sole issue in this claim. Plaintiff claims

to be permanently totally disabled. KRS 342.0011(11) (c), defines permanent total disability as 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." "Work" is defined in KRS 342.0011(34) as meaning providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

In determining whether a worker is totally disabled an administrative law judge must consider several factors, including the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that a particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors, such as whether the individual will be able to work dependably and whether the worker's physical restrictions would interfere with his vocational capabilities. Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W. 3d 48 (2000). A review of these criteria follows.

Post injury physical status:

Plaintiff's post-injury physical status is poor. As noted by Dr. Hoskins, Plaintiff has significant lifting restrictions and cannot do repetitive stooping, crouching, pushing or pulling. Likewise, Dr. Stephens, Plaintiff's treating surgeon, curtailed Plaintiff's driving capacity to be no more than 30 miles, without Plaintiff stopping to walk and to stretch. Plaintiff also has to use a cane approximately 90% of the time.

Plaintiff's physical limitations substantially curtail his capacity to be competitive within the present job market, particularly with today's high level of unemployment. There are many uncompromised job seekers looking for work, unfortunately, Plaintiff is substantially compromised both physically and mentally.

Post-injury emotional status:

Plaintiff's post-injury emotional status is poor. Psychologist Moore noted Plaintiff had a depressive quality with withdrawal tendencies. Plaintiff considers his life to be severely disrupted by his physical problems. He feels worthless, helpless and sees himself as a personal failure due to his physical injuries. He is unable to cope with customary stressors. It was noted that his ability to persist during the course of a day is significantly impaired by his depression and irritability due to chronic pain. Defendant's Dr. Granacher's input does little to discredit psychologist Moore's input. Dr. Granacher diagnosed Plaintiff with, "Major depression due to pain associated with the physical injury of September 26, 2009." Dr. Granacher assessed a 10% psychiatric WPI rating. No portion of the 10% WPI rating was attributable to a pre-existing psychiatric or psychological condition.

Intellectual status:

Plaintiff has demonstrated the ability to learn. He has an average IQ, but now his ability to study and learn is substantially compromised by his depressed state and inability to concentrate. What Plaintiff learned, vocationally, is how to do the specific tasks needed by the Defendant/Employer, but now he could not do those tasks.

At the Final Hearing Plaintiff testified he cannot concentrate; he described his situation, "I love to read books and I can start getting into a chapter and I'll move with sharp pain and I lose all thought." Until Plaintiff attains substantial pain relief he will have difficulties concentrating, and these difficulties are impediments to Plaintiff's ability to concentrate and learn.

Vocational status:

Plaintiff's vocational status is not good. If he is to engage in a new vocation he will need to learn. At the time of his injury he was well trained to operate and maintain dialysis machines but, now due to his physical and mental limitations, he is unable to do the tasks needed to successfully perform the job he was performing when injured. According to his Form 104 Plaintiff has worked as an area manager for a Pepsi-Cola Distribution Center; a semi-truck driver; a security guard; and, a manager of a fast food restaurant, but it is unlikely Plaintiff can perform duties and tasks associated with these prior jobs. Such limitations are due to his physical pain and his poor psychological status. At the Final Hearing Plaintiff was asked if he had given thought to performing any other jobs, and he responded, "My thing is that if they can do something to get this thing out of my back I would love it. Somebody send me back to school…The thing is the pain. I have thought about classes, but it's likely, okay I can't sit that long for classes." Plaintiff's vocational outlook is bleak. He has been deemed entitled to receive Social Security Disability benefits.

Interaction of the factors:

Each of the above discussed factors, when combined, reveal the complications and hardship Plaintiff would confront if he was able to seek employment. Plaintiff's work has always been of a physical nature–-pushing, lifting, bending, stooping, and he has severe limitations on now doing those tasks. As Plaintiff has so accurately stated when asked about looking for other jobs, "If you were an employer and I walked into your place of employment, hobbling on a cane, in pain, would you hire me."

There is little doubt Plaintiff has legitimate symptoms of severe back and leg pain, with this pain he is unable to concentrate, thus precluding him from doing his past jobs or learning a new vocation. Plaintiff's pain and physical limitations clearly interferes [sic] with his ability to work on a consistent basis. It is unlikely one would employee [sic] an applicant for a job, when the applicant requires the use of a cane 90% of the time. It is unlikely an applicant, who can only sit, stand, or walk for relatively brief periods of time without having to take 10 to 15 minute breakes [sic], and with Plaintiff’s other problems, is going to be hired, particularly in this time of high unemployment and job seeking. It is unlikely one would employ an applicant who suffers from depression, and who would be unable to concentrate on learning new job tasks and carrying out work responsibilities. Plaintiff's limitations would have a substantial impact on Plaintiff's employability and reliability.

Based upon the above review of the criteria set forth in Watson, this ALJ is persuaded Plaintiff is permanently

> totally disabled. This ALJ had an opportunity to see and hear Plaintiff testify, and was impressed with his truthfulness and forthrightness. His pain and emotional uneasiness was apparent. He hurts physically and emotionally. There is no doubt Plaintiff would like to work if he was pain and depression free. There is no doubt Plaintiff would and could work to learn new vocations if he was pain and depression free. Plaintiff is substantially occupationally impaired. He is unable to "work" as that term is defined in KRS 342.0011(34).

Fresenius filed a petition for reconsideration on October 26, 2011 arguing there were patent errors in the ALJ's opinion, order and award. First, Fresenius argued the ALJ noted Nelson complained of continuing right leg and back pain following surgery in February, 2010. Yet, according to Fresenius, the records do not support that conclusion.

Fresenius also took issue with the ALJ's characterization of Reba Moore as "Dr. Reba Moore." Fresenius noted Ms. Moore listed herself as having a PSY.S degree, which is a postmaster's specialist degree in psychology, but not rising to the level of a doctorate. Finally, Fresenius argued the ALJ's finding that Nelson was totally disabled was a patent error on the face of the award, specifically in light of the fact his treating physician, Dr. Stephens, returned him to gainful

employment. Dr. Stephens assigned appropriate restrictions, but at no time indicated Nelson would be unable to work. Fresenius argued Nelson should be found to have only a permanent partial disability.

On November 14, 2011, the ALJ summarily overruled Fresenius' motion for reconsideration.

On appeal, Fresenius argues this matter should be remanded for factual findings consistent with the evidentiary record. Fresenius states that, in the opinion, order and award, the ALJ made several material misstatements of fact in support of his finding Nelson is permanently and totally disabled. First, Fresenius notes the ALJ indicated Nelson continued to complain of ongoing right leg pain following the February 2, 2010 lumbar decompression surgery. Fresenius asserts Dr. Stephens' postsurgical medical records did not indicate Nelson had ongoing right leg pain following the surgery. While there is some indication of post-surgical mechanical low back pain, there is no indication of pain in the right leg itself. Fresenius asserts Dr. Stephens' records establish Nelson reported his leg pain was much improved by the surgery. Further, when Dr. Stephens last saw Nelson on July 12, 2011, there was no mention of any pain, symptoms or problems relative to the right leg. Thus, Fresenius

argues the ALJ’s statement that Nelson continued to complain of right leg pain which was repeatedly charted in Dr. Stephens’ records is clearly erroneous. Fresenius contends Dr. Stephens’ post-surgical office notes actually reflect a total, or near total, resolution of the preoperative right leg pain condition. Fresenius notes the mistaken belief that Nelson continued to suffer from a right leg pain condition following surgery could very well have been the deciding factor which transformed the claim from a permanent partial disability to an award of permanent total disability.

Next, Fresenius argues the ALJ's finding of permanent total disability was in error and should be reversed. Fresenius argues the ALJ's inaccurate findings of material facts regarding Nelson's post-surgical right leg condition rendered his finding of a permanent and total disability reversible. Fresenius notes Dr. Stephens indicated the only physical restrictions warranted were a thirty mile driving limitation and a fifteen pound ceiling on lifting activities. Fresenius notes Dr. Stephens never indicated Nelson was forever barred from returning to the workforce. Fresenius argues Dr. Stephens’ finding that Nelson is fully capable of returning to work with only very modest restrictions is overwhelming evidence sufficient to compel

a reversal of the total disability award and mandates a finding of partial disability.

Fresenius also argues the ALJ erred in failing to address the request for a vocational assessment. Fresenius contends Nelson is an excellent candidate for vocational rehabilitation. It notes Nelson has a 12th grade education with post-secondary coursework in health education. Nelson possesses a valid commercial driver's license and received considerable specialized training as a dialysis technician. Thus, Fresenius argues, Nelson is an excellent candidate for vocational retraining and rehabilitation in light of his rather modest physical restrictions and vocational limitations. Fresenius states it was premature for the ALJ to have summarily concluded Nelson is not a candidate for any sort of rehabilitation. It contends a standard vocational assessment, as permitted pursuant to KRS 342.710, is necessary to ascertain Nelson's ability to return to the labor market.

Nelson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Nelson was successful in his burden, the question on appeal is whether there was substantial evidence of record to

support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, the ALJ, as fact-finder, has the sole discretion to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). An 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). 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. 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).

We believe the ALJ's findings are supported by substantial evidence and he had a sufficient understanding

of the evidence in reaching his determination. We therefore affirm. While Dr. Stephens' April 4, 2010 note indicated Nelson's radicular pain had resolved, his notes reflect Nelson had ongoing problems with numbness in his leg. Dr. Stephens' note on June 11, 2010, states Nelson will have residual long-term pain, but does not indicate the location of that pain. It is important to note Nelson testified his leg pain returned six months following surgery. Since surgery was performed in February, 2010, his leg pain would have returned in approximately August, 2010. The final treatment note from Dr. Stephens is dated August 12, 2010, thus Nelson may or may not have been experiencing leg pain at that time.

The ALJ's finding that Nelson had "legitimate symptoms of severe back and leg pain" is not based explicitly on Dr. Stephens' records. Significantly, Dr. Corbett, in his IME on August 12, 2010, found pain radiating through the right buttock into the back of Nelson's thigh. On June 13, 2011, Dr. Hoskins stated Nelson had constant numbness in the right lower extremity and intermittent pain in both lower extremities. Thus, in addition to Nelson's testimony, the record contained medical findings of continued pain in the right leg after surgery.

Pursuant to KRS 342.0011(11)(c), “permanent total disability” is defined in pertinent part as “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...” The determination of permanent total disability, as articulated by the Supreme Court of Kentucky in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), requires a weighing of the evidence concerning whether the worker "will be able to earn an income by providing services on a regular and sustained basis in a competitive economy." Ira A. Watson Department Store at 51. The Supreme Court articulated the factors an ALJ may consider in making this determination stating as follows:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson*, *supra*, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected

> by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See, *Osborne v. Johnson*, *supra*, at 803.

Id. at 51.

Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, *supra*; Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). In making a determination of whether a claimant is totally disabled, the ALJ may rely on the medical testimony, a worker's own testimony regarding his physical condition and ability to labor, or a combination of both. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

After reviewing the evidence of record, the ALJ applied the appropriate legal standard for determining permanent total disability in accordance with the Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, *supra*. Taking into account Nelson's age, education, and past work experience, in conjunction with his post-injury

physical and psychological status due to the effects of his work-related injury and subsequent surgery, the ALJ was persuaded Nelson was permanently totally disabled. Substantial evidence exists to support that conclusion. For that reason, we cannot say the ALJ's finding Nelson's entitlement to an award of permanent total disability benefits is so unreasonable under the evidence the decision must be reversed as a matter of law. Likewise, we find the ALJ adequately explained the basis and reasoning behind his award.

We find no error in the ALJ's refusal to order a vocational rehabilitation evaluation. The evaluation was not a contested issue at the BRC, was not raised prior to the hearing, and was not raised in briefs to the ALJ. Fresenius first raised the issue concerning the evaluation in its petition for reconsideration. This issue was directly addressed in Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60 (Ky. App. 2005). The Court of Appeals noted KRS 342.710(3) provided that an ALJ, on his own motion or upon application of any party or carrier after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation. The court noted the use of "may" in KRS 342.710(3) placed vocational rehabilitation entirely within

the ALJ's discretion. Further, the Court found it significant neither party requested a vocational evaluation when the matter was before the ALJ. The Court of Appeals ruled the Board abused its discretion by ordering the CALJ to consider vocational rehabilitation as it was within the discretion of the CALJ since neither party requested such evaluation. A petition for reconsideration is not the proper vehicle to request a vocational rehabilitation evaluation, nor is an appeal to the Workers' Compensation Board.

Accordingly, the decision of Hon. Otto Daniel Wolff, IV, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON F. ALLON BAILEY
3151 BEAUMONT CENTRE CIRCLE #200
LEXINGTON, KY 40513

HON. PATRICK J. MURPHY II
3151 BEAUMONT CENTRE CIRCLE, SUITE 200
LEXINGTON, KY 40513

COUNSEL FOR RESPONDENT:

HON. OTIS DOAN JR.
117 N FIRST ST
HARLAN, KY 40831

ADMINISTRATIVE LAW JUDGE:

HON OTTO DANIEL WOLFF, IV
8120 DREAM STREET
FLORENCE, KY 41042