Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 26, 2014

CLAIM NO. 201376990

JOHNNIE BROWN PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

THE WILLOWS
HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART and REMANDING

* * * * * *

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

ALVEY, Chairman. Johnnie Mae Brown ("Brown") seeks review of the Opinion and Award rendered May 21, 2014 by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ") finding she sustained a low back strain and left hip injury due to a June 18, 2013 work injury. The ALJ found the lumbar injury did not warrant a permanent impairment rating and only

awarded permanent partial disability ("PPD") benefits increased by the three multiplier for the left hip injury. Brown also seeks review of the June 18, 2014 order denying her petition for reconsideration.

On appeal, Brown argues the ALJ erred in not awarding PPD benefits for her low back injury. We disagree since substantial evidence supports the ALJ's determination and no contrary result is compelled. However, we vacate in part and remand for a determination of whether Brown is entitled to temporary medical benefits for her low back injury.

Brown filed a Form 101 on October 14, 2013 alleging she injured her left hip, left leg, and the left side of her back on June 18, 2013 when she experienced a pop while transferring a resident from a bed to a wheelchair. At the time of the incident, Brown was working as a nursing assistant at the Willows at Hamburg ("The Willows").

Brown testified at the deposition on January 23, 2014 and at the final hearing held March 28, 2014. Brown was forty-two years old at the time of the June 18, 2013 work incident and resides in Lexington, Kentucky. Brown completed high school and is a certified nursing assistant ("CNA"). Brown served in the United States Army Reserve from 1989 to 2000 as a supply specialist. She worked at

several facilities as a CNA and a correctional officer. Brown began working at the Willows as a CNA on January 29, 2013. Her position required her to lift at least fifty pounds. She has not returned to work since her June 18, 2013 work incident.

On June 18, 2013, Brown and another nursing assistant were transferring a resident from the bed to a wheelchair. As they lowered the resident into the wheelchair, Brown experienced a pop in the lower left side of her back and hip. She experienced immediate pain and stated her left leg felt rubbery. Brown was unable to complete her shift and was taken to the Urgent Treatment Center. After x-rays were taken, Brown was initially advised she may have broken her hip, but was later informed by a different physician she may have a bad bruise.

Brown was referred to Dr. Jerry Morris by her attorney. Dr. Morris ordered several diagnostic studies and therapy. He prescribed crutches, pain medication and an anti-inflammatory medication. He also restricted her from work.

Brown also treated with Dr. Oliver James for pain management. Dr. James ordered additional diagnostic studies, administered an injection and took over her medication regimen. At the hearing, Brown indicated Dr.

Morris had recently discharged her from his care. She stated requests for a second injection and a repeat EMG by Dr. James had been denied by the workers' compensation insurer. She also stated she had recently been referred to the Pasadena Pain Clinic by Dr. Bean.

Brown experiences pain in the lower left side of her back radiating into her hip and down her left leg. She also experiences tingling and numbness when she sits for long periods of time. She has difficulty sleeping, cannot sit or stand for prolong periods of time, and no longer drives. Brown stated she uses a cane to assist with ambulation. Brown testified she cannot return to work as a CNA at the Willows due to her current limitations stemming from her injuries.

Brown and the Willows filed various medical records for treatment she received following the June 18, 2013 work incident. Brown reported to the Concentra Medical Center on June 18, 2013 after her incident. X-rays of the hip and left leg demonstrated no acute bony abnormality, but revealed changes consistent with osteoarthritis. The physician noted the x-rays were suspicious for a fracture. Brown was restricted from work, prescribed crutches and medication, and ordered to return in three days for a re-evaluation. Brown returned on June 21, 2013 complaining of

worsening symptoms. Brown was diagnosed with hip, thigh and knee strains and referred to an orthopedic surgeon.

Brown first treated with Dr. Morris on June 27, 2013. He noted Brown complained of intense pain in the left hip girdle, she was unable to bear weight on her left leg, and used crutches for ambulation. Dr. Morris diagnosed internal derangement of the left hip secondary to work-related trauma and strain; traumatic bursitis left trochanter; piriformis syndrome left hip; and strain of the posterior superior iliac spine ligaments on the left. Dr. Morris opined Brown's left hip and lower extremity symptoms resulted from the June 18, 2013 work incident. Dr. Morris restricted Brown from work, initiated physical therapy, and prescribed medication. The records reflect Brown continued to treat with Dr. Morris until December 2013. A July 18, 2013 MRI of the left hip revealed no evidence of internal derangement. A July 18, 2013 lumbar spine MRI was negative except for mild thoracolumbar scoliosis. An August 15, 2013 ENCV/EMG study of the left lower extremity was unremarkable with no evidence of radiculopathy, generalized peripheral neuropathy or plexopathy. Following the diagnostic studies, Dr. Morris diagnosed work-related low back and left hip strain; persistent low back pain radiating into the left lateral thigh in the L4-5 dermatome; persistent tenderness

in the left sciatic notch, left trochanteric bursa and tensor fascia lata muscle of the left thigh, with piriformis muscle syndrome; and deranged gait due to lower extremity pain. Dr. Morris continued a course of conservative treatment. He kept Brown off work and referred her to pain management.

Dr. James, a pain management physician, began treating Brown on October 1, 2013. He recommended a left SI joint injection, prescribed medication, and restricted Brown from work. On November 8, 2013, Dr. James administered a left sacroiliac steroid injection, which was unsuccessful. On November 26, 2013, Dr. James diagnosed lumbar degenerative disc disease; lumbar spondylosis; lumbar facet arthropathy; and left hip pain. He recommended a left lower lumbar injection, ordered additional diagnostic studies, and prescribed Norco and Zipsor.

In support of her claim, Brown filed the February 1, 2014 report of Dr. Anthony McEldowney who noted she complained of low back, left hip and left leg pain with no numbness or tingling. After reviewing the medical records and performing an examination, Dr. McEldowney diagnosed a lumbar sprain/strain and left greater trochanteric bursitis. He opined Brown’s injuries caused her complaints, and her subjective complaints and objective findings resulted from

the June 18, 2013 work-related injuries to her low back and left hip. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fifth Edition ("AMA Guides"), Dr. McEldowney assessed a 7% impairment rating for Brown's lumbar condition using the DRE lumbar category II and a 3% impairment for her chronic trochanteric bursitis with abnormal gait, yielding a combined 10% impairment rating. He opined Brown attained maximum medical improvement ("MMI") in November 2013 and assigned permanent restrictions. Dr. McEldowney stated Brown does not retain the physical capacity to return to the type of work she performed at the time of injury. In a March 3, 2014 supplement, Dr. McEldowney noted his disagreement with Dr. Philip Corbett's opinion and stated his opinions contained in the February 1, 2014 report remained unchanged.

The Willows filed the January 27, 2014 report of Dr. Corbett, who evaluated Brown at its request. Brown complained of severe back, left buttock and left hip pain after the June 18, 2013 work incident, and used a cane. Dr. Corbett noted Brown had previous muscle strains in her back. X-rays of the lumbar spine taken on the day of the examination demonstrated minimal evidence of degenerative changes in L2-L5 with no evidence of wedge compression,

spondylolysis, spondylolisthesis, disc space narrowing or SI joint dysfunction. A hip x-ray demonstrated both hips have mild degenerative changes with no evidence of an acute injury. After reviewing the medical records and performing an examination, Dr. Corbett diagnosed exogenous obesity; degenerative joint disease involving both hips; and left greater trochanter bursitis and sprain of the gluteus maximus, tensa fascia lata, and gluteus medius, left buttock, as well as contusion of those muscles.

Dr. Corbett opined Brown suffered a left buttock contusion due to her June 18, 2013 work injury, which caused her to develop trochanter bursitis of the left hip. He opined Brown had some degree of pre-existing degenerative joint disease involving both hips, which was not disturbed. Dr. Corbett stated Brown reached MMI three months following her June 18, 2013 incident. Regarding impairment, Dr. Corbett stated as follows:

> I cannot assign a permanent impairment to [Brown] on the basis of her current findings to date, as she does not qualify for such under the 5th edition of the AMA *Guides*. She has no evidence of an impairment reflecting injury to her lumbar spine and does not qualify for any of the impairing features associated with Table 17-2 regarding her lower extremities. The arthritis identified on today's x-ray involving both hips is, in all medical probability, not traumatic in origin and

> definitely preexistent to the date of injury based on the x-rays and interpretations of x-rays from 2011. The patient has had similar episodes of complaints of pain referable to the myofascial structures of her low back and left buttock in the past and may have reinitiated those complaints.

Therefore, Dr. Corbett assessed a 0% impairment rating, found permanent restrictions unnecessary and stated Brown is not permanently and totally disabled. Dr. Corbett recommended a functional capacity evaluation and possible steroid injections in the left trochanter bursa. Finally, Dr. Corbett noted Brown exhibited several positive Waddell's signs, and evidence of symptom magnification.

After summarizing the evidence, the ALJ found Brown suffered a low back strain and left hip injury due to the June 18, 2013 work-related incident, relying upon Dr. Morris' opinion since he treated her for over five months. The ALJ found Brown entitled to temporary total disability ("TTD") benefits from June 18, 2013 to November 26, 2013, the day Dr. McEldowney found Brown reached MMI. In finding only the hip injury warranted a permanent impairment rating, the ALJ stated as follows:

> Having found that Plaintiff suffered a work injury, the undersigned finds the Plaintiff has suffered a permanent partial disability as a result of the work injury. The medical opinions as to impairment are contradictory. Dr.

> Corbett opined Plaintiff had no impairment. Dr. McEldowney opined she suffers from a total of 10% whole body impairment. He assigned 7% to the lumbar spine and 3% to chronic trochanteric bursitis. After a comprehensive review of the medical evidence in this case, I find Plaintiff suffered an injury that resulted in 3% impairment due to chronic trochanteric bursitis - but I do not find she has permanent impairment as it relates to the lumbar spine. For this opinion I rely on Dr. Corbett and Dr. McEldowney's opinion(s) as well as the medical records of Dr. Morris and Dr. James. I found the diagnostic testing did not support the Plaintiff's position that she has permanent lumbar spine impairment. The result of these findings and applying the 3% impairment rating to the AMA grid factor per KRS 342.730, is that Plaintiff retains 1.95% Permanent Disability Rating.

The ALJ found Brown lacks the physical capacity to return to the work performed on the date of the injury and is entitled to the 3 multiplier per KRS 342.730(1)(c)1. Therefore, the ALJ awarded Brown TTD benefits and PPD benefits based upon a 3% impairment rating for her hip injury and increased by the three multiplier. The ALJ also awarded medical benefits ". . . as may be reasonably required for the cure and/or relief from the effects of the work injury as to her chronic trochanteric bursitis." The opinion is silent regarding medical benefits for the lumbar injury.

Brown filed a petition for reconsideration arguing the same as she does on appeal. In the June 18, 2014 order denying Brown's petition, the ALJ reiterated she relied on the opinions of Drs. Corbett and McEldowney, as well as the records of Drs. Morris and James, in concluding she suffered an injury warranting a 3% impairment rating due to chronic trochanteric bursitis but no impairment for the lumbar spine. The ALJ emphasized she has authority to accept portions and disregard other portions of an expert witness' testimony, and found no error in her reliance upon Dr. Corbett in part, Dr. Morris in part and Dr. McEldowney in part.

On appeal, Brown argues the ALJ failed to award income benefits for her low back injury. Brown argues since Dr. Corbett did not diagnose Brown with a low back injury, his opinion concerning a lumbar impairment is not competent. Brown also asserts the ALJ provided no explanation as to why she found Dr. Corbett's assessment of lumbar impairment persuasive and valid in light of her finding of a work-related lumbar injury. In the alternative, Brown argues Dr. Corbett's opinion concerning her low back injury is grossly outweighed by the medical evidence of record, and a contrary finding in her favor is compelled. Brown also the ALJ erred by drawing a medical conclusion when she found the

diagnostic testing does not support her position she has permanent lumbar spine impairment.

As the claimant in a workers' compensation case, Brown bore the burden of proving each of the essential elements of her cause of action, including extent and duration of disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Brown was unsuccessful in her burden of proving her work-related lumbar injury warranted a permanent impairment rating, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling Evidence" is defined as evidence 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ's determination regarding the extent and duration of Brown's hip injury is not in dispute. Likewise, the parties do not dispute the ALJ's finding Brown suffered a low back strain due to the June 18, 2013 work incident. The sole issue on appeal is whether Brown's low back strain warrants a permanent impairment rating pursuant to the AMA Guides. In this instance, the record contains substantial evidence supporting the ALJ's determination Brown's low back strain did not result in permanent impairment, and no contrary result is compelled.

Here, the ALJ was presented with two conflicting independent medical evaluation reports, along with Brown's treatment records. Dr. McEldowney diagnosed Brown with a lumbar sprain/strain and left greater trochanteric bursitis

due to the June 18, 2013 work incident. He then assessed a 7% impairment for Brown's lumbar condition and a 3% impairment for her chronic trochanteric bursitis, yielding a combined 10% impairment rating, pursuant to the AMA Guides. Dr. Corbett diagnosed exogenous obesity; degenerative joint disease involving both hips; and left greater trochanter bursitis and sprain of the gluteus maximus, tensa fascia lata, and gluteus medius, left buttock, as well as contusion of those muscles. He opined the left buttock contusion and trochanter bursitis of the left hip directly resulted from June 18, 2013 work injury. However, he opined she did not qualify for a functional impairment rating pursuant to the AMA Guides. He specifically stated Brown "has no evidence of an impairment reflecting injury to her lumbar spine and does not qualify for any of the impairing features associated with Table 17-2 regarding her lower extremities. . . ."

The ALJ acted within her discretion and was free to rely in part on Dr. McEldowney's assessment of impairment regarding Brown's hip injury and in part on Dr. Corbett's assessment of impairment regarding her low back strain. Magic Coal Co. v. Fox, supra; Whittaker v. Rowland, supra. The ALJ also relied upon the various diagnostic studies of the lumbar spine in support of her determination. In

summarizing the evidence, the ALJ quoted the findings from the June 18, 2013 radiology report, the July 18, 2013 MRI of the lumbar spine and left hip, and the August 15, 2013 NCV/EMG study. The ALJ properly considered all of the evidence of record, and reached a decision supported by substantial evidence and in conformity with the law. Thus, we are without authority to direct a contrary result in Brown's favor.

With that said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ

concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Here, the ALJ found Brown sustained work-related injuries to her lumbar spine and hip, but only the hip injury warranted income benefits. The ALJ also awarded medical benefits ". . . as may be reasonably required for the cure and/or relief from the effects of the work injury as to her chronic trochanteric bursitis." The opinion is silent regarding medical benefits for the lumbar injury. Therefore, while the ALJ's determination Brown did not sustain a permanent injury to her lumbar spine is supported by substantial evidence, she must make a determination of whether Brown is entitled to medical benefits pursuant to KRS 342.020 based upon the holding in FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007). Clearly, the ALJ may award medical benefits despite the lack of a permanent injury after providing sufficient reasons for the award.

This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

For the foregoing reasons, the May 21, 2014 Opinion and Award, and the June 18, 2014 order denying Brown's petition for reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED IN PART** and **REMANDED.** On remand, the ALJ is directed to determine whether Brown is entitled to medical benefits for her work-related low back strain pursuant to Robertson v. United Parcel Service, supra; and FEI Installation Inc. v. Williams, supra.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JAMES D HOWES
5438 NEW CUT ROAD, STE 201
LOUISVILLE, KY 40214

COUNSEL FOR RESPONDENT:

HON AZIZA H ASHY
300 EAST MAIN ST, STE 400
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

HON JEANIE OWEN MILLER
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601