OPINION ENTERED: JULY 26, 2012

CLAIM NO. 200871970

KELLY PASS PETITIONER

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

PASCHALL TRUCK LINES, INC.
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Kelly Diane Pass ("Pass") appeals from the January 3, 2012 Opinion, Award and Order on remand rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"), determining Pass had sustained a permanent partial disability as a result of a psychological condition. She also appeals from the February 14, 2012 Order denying her petition for reconsideration. On appeal, Pass argues the

ALJ erred in failing to find her permanently totally disabled as a result of the psychological condition or not finding a greater permanent partial disability.

Pass filed her claim on November 9, 2009, alleging physical injuries as a result of a work-related motor vehicle accident. Pass later amended her claim to include a psychological component.

Pass submitted medical reports from Susan Dorski, Ph.D., who evaluated Pass on December 23, 2008 and diagnosed post-traumatic stress disorder ("PTSD"). She noted Pass appeared anxious, was having nightmares about the motor vehicle accident and was now afraid to drive. On June 1, 2010, Dr. Dorski issued a psychological report diagnosing PTSD, adjustment disorder with prolonged depressive reaction, spondylosis and reflex sympathetic dystrophy ("RSD"). In a June 22, 2010 supplemental report, Dr. Dorski opined Pass could not return to her former line of work for emotional and physical reasons.

Pass also submitted the report of David Shraberg, M.D., who examined her on April 19, 2010. Dr. Shraberg diagnosed acute stress reaction with elements of chronic PTSD and phobic avoidance, narcotic dependency, elements of PTSD from childhood onward, dependent personality with avoidant traits and symptom magnification, pre-existent

chronic cervical spondylosis and cervicalgia, temporarily exacerbated by soft tissue injuries and the October 29, 2008 accident from which she recovered with baseline chronic cervicalgia, non-disabling, and stressors of occupational uncertainty and litigation. Dr. Shraberg placed Pass in Class II impairment using the American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides") with a mild impairment associated with a primary restriction of inability to drive a truck. Utilizing the 2nd Edition of the AMA Guides, he stated Pass had a 3% to 5% impairment. He felt there could be further improvement by eliminating narcotics, pain medication and Neurontin which was merely causing her narcotic dependency, possibly depressed mood and weight gain.

Dr. Shraberg noted the structured inventory of malingered symptomatology results demonstrated a significantly elevated score. He stated the influence of secondary gain must be considered given the fact Pass was in litigation. The physical symptom scales revealed Pass' extreme pain reports were significantly higher than those of 99% of chronic pain patients.

In an August 4, 2010 supplemental report, Dr. Shraberg indicated his review of additional medical reports from

Drs. Tutt and Bauer did not alter his opinions. He believed Dr. Bauer ignored the detailed history of pre-existing physical and psychological symptoms similar to what Pass presently complained of and falsely attributed to the motor vehicle accident.

In a March 22, 2011 Opinion and Order, the ALJ determined Pass both failed to prove she sustained permanent physical injuries and failed to give timely notice of an alleged psychological injury. Pass appealed and the Board, in an Opinion rendered October 21, 2011 affirmed the ALJ's decision with respect to the physical injury claim, but reversed and remanded with regard to the psychological injury concluding:

> Under the facts of this case, as a matter of law, notice given regarding the physical injuries was sufficient notice for the psychological condition as well. We therefore reverse and remand this matter to the ALJ for further findings regarding the psychological condition. On remand, the ALJ shall address the existence of any psychological condition and the causation and extent and duration of any psychological condition. We note the record contained conflicting evidence regarding causation of the psychological condition. The Board, however, has no fact finding authority.

On remand, the ALJ determined that, while Pass failed to prove the work incident produced a physical injury, she

had a physically traumatic event resulting in a diagnosis of post-traumatic stress disorder. The ALJ made the following findings relevant to this appeal:

> Plaintiff's treating psychologist, Dr. Dorski, while submitting a supplemental report in which she included a table labeled "Evaluation of Psychiatric Impairment" on which several entries and different categories are circled, and expressed the opinion that plaintiff could not return to her former line of work for emotional and physical reasons, does not assign any permanent impairment rating. Dr. Shraberg, on the other hand, assesses the plaintiff with a 3% to 5% permanent impairment rating, using the 2nd Edition of the AMA Guidelines, [sic] having determined that the plaintiff retains a mild impairment associated with the primary restriction of not being able to drive a truck. While it is true that Dr. Shraberg also indicates in his report at the plaintiff has "no permanent psychiatric impairment", I find that opinion inconsistent not only with his prior assessment of a 3% to 5% impairment rating but his opinion that the plaintiff does require workplace accommodation regarding the inability to drive a truck. Utilizing the discretion afforded to me as an Administrative Law Judge, I find and conclude, therefore, based on the report of Dr. Shraberg, that the plaintiff has sustained a 3% permanent impairment rating from a psychological standpoint as a result of the incident of October 29, 2008. Accordingly, the plaintiff has a permanent disability rating of 1.95% (3% X .65). Moreover, I am persuaded by the opinion of the plaintiff and the opinions and reports

of Drs. Dorski and Shraberg that the plaintiff does not retain the capacity to return to her job as an over-the–road truck driver from a psychological standpoint. I find and conclude, therefore, that the plaintiff is entitled to the triple multiplier of KRS 342.730(1)(c)(1) with respect to an award of permanent partial disability benefits.

While the parties have preserved an issue with respect to prior active disability apportionment, the defendant has not submitted any evidence for any portion of the plaintiff's psychological impairment that may be excluded as prior active. As set out in *Finley v. DBM Technologies*, 217 S.W.2d 261 (Ky. App. 2007), a pre-existing condition is considered "active" only when it is impairment ratable and actively symptomatic immediately prior to the work incident in question. In this case, there is no evidence that plaintiff was experiencing psychological/psychiatric symptoms immediately prior to October 29, 2008 nor is there evidence that immediately prior to October 29, 2008 the plaintiff had a psychological/psychiatric condition which was impairment ratable under the AMA Guides. Accordingly, the defendant has failed to prove that any portion of plaintiff's permanent partial disability is to be excluded as prior active impairment.

Plaintiff is, therefore, entitled to an award of permanent partial disability benefits calculated as follows: $515.31 X 2/3 X 3% X .65 X 3 = $20.10 per week for 425 weeks.

Pass filed a petition for reconsideration arguing the evidence supported a finding of a permanent total disability as a result of her psychological condition. By order dated February 14, 2012, the ALJ overruled the petition for reconsideration stating:

> Having reviewed the plaintiff's motion, the defendant's response, the Opinion, Award and Order on Remand, as well as the reports of Drs. Shraberg and Dorski, the ALJ finds that the plaintiff's petition for reconsideration is, in essence, a reargument of the merits of the claim. An ALJ is prohibited from reweighing evidence and changing a finding of fact when a petition for reconsideration is filed pursuant to KRS 342.281. That said, however, although it is implicit in the ALJ's award of permanent partial disability benefits that he did not find the plaintiff to be permanently and totally disabled, the ALJ makes the following additional findings of fact with respect to the plaintiff's allegation that she is permanently and totally disabled.
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> 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." KRS 342.0011(34), in turn, defines "work" as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy."
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> In *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), the Supreme Court ruled:

> 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 workers 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 workers physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be home bound in order to be found to be totally occupationally disabled. See, *Osborne v. Johnson*, supra, at 803.

Having found in the Opinion, Award and Order on Remand that the plaintiff has a permanent disability rating of 1.95% based on a 3% impairment rating assessed by Dr. Shraberg, it is incumbent on the ALJ to analyze the evidence submitted in light of the factors delineated in *Ira A. Watson Department Store v. Hamilton* as set out above. First, having found that the plaintiff did not sustain a

permanent physical injury as a result of the motor vehicle accident of October 29, 2008, the plaintiff is under no physical restrictions or limitations as a result of that incident. Likewise, plaintiff is only 47 years old and in addition to graduating from high school, attended one semester of college and had additional vocational education as a composite technician and a dietary technician. Her vocational history includes working as a security guard, daycare worker, school custodian and department store stock clerk. With respect to plaintiff's "limitations" by virtue of her psychological condition, Dr. Dorski does not assign specific restrictions other than expressing the opinion that plaintiff cannot return to her former line of work "for emotional and physical reasons" and needs retraining in a career that is not physically demanding. Dr. Dorski's opinions with respect to the plaintiff's residual ability to function, therefore, is [sic] based at least in part on the incorrect assumption that the plaintiff has a debilitating work–related physical condition. While she felt that the plaintiff has what she apparently quantifies as a "moderately severe problem" with respect to her affect, Dr. Dorski also indicated the plaintiff has no deficit with respect to intelligence, thinking, perception, judgment and only a "slight problem" with behavior as well as needing "minor help" in terms of activities of daily living. This is not the profile of a permanently and totally disabled individual. In addition, the ALJ finds the opinion of Dr. Shraberg to be more persuasive and from his report it is clear that the only restriction he believes the plaintiff is in need of is a restriction against returning to over-the-road commercial truck driving. Otherwise, she has <u>no</u> restrictions from

> a psychological/psychiatric standpoint. Accordingly, having reviewed the evidence and considered the argument of counsel, the ALJ makes an additional finding that the plaintiff is not permanently and totally disabled, and her petition for reconsideration is, therefore, overruled.

On appeal, Pass argues the ALJ erred in failing to find her totally disabled pursuant to KRS 342.730 or by not finding a greater partial disability. Pass notes the AMA Guides in section 14.3 lists four main categories for assessment of function. They include 1) the ability to perform activities of daily living; 2) social functioning; 3) concentration, persistence, and paste; and 4) deterioration or decompensation in complex or work like settings. Based on the evaluation by Dr. Dorski, Pass contends, under table 14–1, she has at least a marked impairment if not extreme impairment. She notes, under table 14–2, signs and symptoms of posttraumatic stress disorder include decreased concentration, which would result in limitations in vocational ability. Pass argues the findings and assessment by Dr. Shraberg of a 3% to 5% impairment do not fully take into account her limitations following the injury. She contends Dr. Dorski's findings would be more accurate. Pass argues her percentage of impairment would be much greater if the AMA Guides were

accurately applied. Pass argues that, when the elements of the statute and the principles in Osborne v. Johnson, *supra,* are considered, she has met those conditions and should be found to be totally and permanently disabled.

Pass bore the burden of proving each of the essential elements of her cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Pass was unsuccessful in her burden of proving any greater degree of disability, the question on appeal is whether the evidence compels 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 quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). 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). Although a party may note evidence that would have supported a different outcome than that

reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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).

Pass' arguments on appeal regarding the extent of her disability are essentially an attempt to have the Board re-weigh the evidence and substitute its opinion for that of the ALJ. We may not do so. The evidence falls far short of compelling a finding Pass sustained a permanent total disability or a greater degree of permanent partial disability. Indeed, it is rare that it can be said the evidence compels a greater or lesser degree of occupational disability. Millers Lane Concrete Co., Inc. v. Dennis, 599 S.W.2d 464, 465 (Ky. App. 1980). We further note that while the claimant's own testimony may constitute substantial evidence to support an award, the law is well settled that a claimant's testimony does not compel any particular result. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Bullock v. Gay, 296 Ky. 489, 177 S.W.2d 883 (1944). Pass' ability to point to evidence supporting a conclusion in her favor is an insufficient basis to reverse the ALJ's opinion in the face of substantial evidence to the contrary.

It is clear from the ALJ's Order ruling on the petition for reconsideration he understood and applied the correct standard in determining the extent of Pass' disability. Here, as determined by the ALJ, there are no physical restrictions related to the work injury and her primary psychological restriction is not to drive a truck. The ALJ noted Dr. Dorski felt Pass had a moderately severe problem with respect to her affect, but had no deficit with respect to her intelligence, thinking, perception, and judgment. Further, she had only a slight problem with behavior and needed only minor help with activities of daily living. The ALJ was not convinced these limitations were sufficient to render Pass permanently totally disabled. Further, as noted by the ALJ, Dr. Shraberg found no restrictions were necessary other than the restriction from working as an over-the-road truck driver. There was substantial evidence to support the ALJ's conclusion Pass was not permanently totally disabled as a result of the psychological condition.

We reject Pass' argument that the AMA Guides, when properly applied, would result in a higher impairment. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court instructed that the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts.

An ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be accorded an expert's impairment assessment, but is never required to do so. In Caldwell Tanks v. Roark, 104 S.W.3d 753 (Ky. 2003), the Court instructed when faced with un-refuted medical evidence of increased hearing impairment in the two-year period prior to filing of workers' compensation claim, the ALJ was both authorized and required to consult the AMA Guides and to convert the earlier evidence of hearing impairment into a whole-body impairment, for purposes of determining claimant's medical and income benefits. Generally, the ALJ's authority to use the AMA Guides is limited to essentially mechanical applications. An ALJ is authorized to use the combined values chart, *see* Thomas v. UPS, 58 S.W. 3d 455 (Ky. 2001), select an impairment rating within a class of impairment stated by a physician, *see* Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002), or use the Guides in other instances where medical expertise is not required.

Here, on June 22, 2010, Dr. Dorski circled words and made notations on a copy of a "Table 1 Evaluation of Psychiatric Impairment" but did not convert the findings into a class of impairment pursuant to the AMA Guides. Although Pass expresses her belief Dr. Dorski's statements

on this table would warrant placement in a marked or extreme impairment category using Table 14-1 of the AMA Guides, such a determination must be made by a medical expert and is beyond an ALJ's authority. Dr. Shraberg's rating was the only rating filed in the claim. Thus we find no error in the ALJ's selection of Dr. Shraberg's impairment rating. The evidence did not compel a finding of any greater degree of permanent partial disability.

Accordingly, the January 19, 2012 Opinion, Award and Order on remand rendered by Hon. Robert L. Swisher, Administrative Law Judge, and the February 14, 2012 Order ruling on the petition for reconsideration are hereby **AFFIRMED.**

ALL CONCUR.

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