OPINION ENTERED: SEPTEMBER 28, 2012

CLAIM NO. 200490045

KENTUCKY CARDIOLOGY, PSC PETITIONER

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

AMY R. ELMORE
and HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

SMITH, Member. Kentucky Cardiology, PSC ("Kentucky Cardiology") appeals from the May 21, 2012 Opinion, Order and Award rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ") finding Amy Elmore ("Elmore") permanently totally disabled.[1] On appeal, Kentucky Cardiology argues the ALJ improperly applied the methodology in Ira A. Watson

[1] Neither party filed a petition for reconsideration.

Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) in awarding permanent total disability benefits.

In its brief to the Board, Kentucky Cardiology states "The Defendant/Employer acknowledges that the ALJ committed no patent error of fact on the face of the claim with regard to the testimony, medical evidence and lay evidence submitted into the record." Rather, its argument on appeal concerns the ALJ's application of the criteria in Watson in his determination of permanent total disability. Since the ALJ provided ample reference to the evidence in his analysis and findings, for purposes of this appeal a separate summary of the medical evidence is unnecessary. Additionally, both parties filed vocational reports which warrant review due to the issues raised in this appeal.

Kentucky Cardiology relies upon the vocational report of Luca Conte, Ph.D., who evaluated Elmore on January 31, 2012. Dr. Conte noted Elmore's chief complaint at the time of the interview was low back pain into the buttocks in both legs. She described a constant level of discomfort amounting to a level "8". She also complained that the batteries in her spinal implant were not functioning resulting in more pain. She no longer had health insurance coverage and "therefore does not take any prescription pain medications." Elmore reported that she cannot sit longer

than a few minutes at a time. She is able to lift light groceries and a gallon of milk. She spends most of her day watching television and doing chores in five-minute intervals.

Dr. Conte noted Elmore completed the eighth grade but later earned a GED. She then completed an Associate's degree in applied sciences from Lexington Community College and then earned a second Associates degree in nuclear medicine. She is computer literate, using her home computer for Internet activities.

Dr. Conte noted Dr. Kriss had advised restrictions which included no lifting more than 20 pounds and the avoidance of repetitive bending/twisting. Dr. Owen also restricted lifting to less than 20 pounds and the avoidance of recurrent bending, squatting or stooping. Dr. Conte found Elmore to be "very employable". An FCE showed Elmore performing, at minimum, in the Sedentary and Light levels. Dr. Conte stated:

> This consensus of opinions would be compatible with full-time remunerative employment in various Sedentary and Light occupations where recurrent bending tasks are not involved.
>
> These restrictions would also be consistent with several of Ms. Elmore's prior occupations, with or without reasonable accommodations. For example, while she may not be able to return to a

> radiology clinic where the potential for lifting patients is involved, she would be capable of working as an X-ray Technician in much lighter settings (e.g. Dentist offices, specialty radiology clinics such as Hand Specialists, Podiatrists, Mammography clinics, etc.) Similarly, her prior work as a Telephone Operator would easily transfer to Sedentary work as a Receptionist, Telephonic Order Specialist, Dispatcher, etc. Finally, with the use of a simple stool as an accommodation, she could easily return to a wide variety of Cashiering positions, ranging from Retail Cashiering in small specialty stores, to sit/stand Parking Lot, Amusement/-Recreation, and/or Service Station Cashiering positions.

Elmore relies upon the December 22, 2011 report of Betty Lindsay Hale, ("Hale") a vocational consultant, who evaluated Elmore on November 29, 2011. Hale concluded Elmore would be considered to have a "severe" work disability. She indicated Elmore continues to experience chronic pain in her low back with radiation into her legs, as well as pain in her upper back with pain and weakness in her right dominant arm. Hale noted Elmore was significantly limited in her ability to perform household chores and would need to take frequent breaks to alternate positions during the day for pain relief. In addition to physical impairments, Elmore had been diagnosed with depression due to multiple symptoms including depressed

mood, mood swings, irritability, lowered frustration tolerance, feelings of hopelessness and helplessness, feelings of meaninglessness and emptiness, pessimism, anger, apathy, anhedonia, amotivation, lowered libido, and a decline in self-confidence. Hale stated "This combination of physical and psychological symptoms would preclude Elmore from performing work activity at any skill or exertional level on a full-time sustained basis."

The ALJ's detailed analysis and findings pertinent to this appeal are in part as follows:

> The central issue in this claim is whether plaintiff is permanently and totally disabled as she contends or whether, as the defendant argues, plaintiff is entitled only to an award of permanent partial disability benefits per KRS 342.730. In order to qualify for an award of permanent disability benefits for partial disability (as defined in KRS 342.0011(11)(b) or total disability (as defined in KRS 342.0011(11)(c)), plaintiff must prove that she has a permanent disability rating. KRS 342.0011(36) defines "permanent disability rating" to mean the permanent impairment rating selected by an ALJ multiplied by the factor set forth in the table that appears at KRS 342.730(1)(b) (the grid factor). None of the physicians whose testimony or reports have been submitted in this proceeding have expressed the opinion that the plaintiff does not have a permanent impairment rating. Moreover, all of the physicians who assigned impairment ratings, Drs. James, Owen

and Kriss, agree that the plaintiff has a 28% permanent impairment rating, although Dr. Owen computed his impairment rating based on the range of motion model while Drs. Kriss and James employed the DRE method, both determining that the plaintiff has a Lumbar Category V impairment. Dr. Kriss attributed 8% of his 28% impairment rating to the effects of the work injury with the remaining 20% being attributable to the 1997 non-work-related lumbar fusion. Dr. Owen agreed that the plaintiff had a pre-existing active condition in her lumbar spine as a result of the 1997 injury and surgery but was unable to apportion the 28% impairment rating as between those injuries. Dr. James did not address the issue of apportionment. Regardless, however, of whether one accepts the opinion of Dr. Kriss that the plaintiff's permanent impairment attributable solely to the work injury is 8% or the opinion of Dr. Owen to the effect that the plaintiff's permanent impairment rating is 28% without any reduction for prior active disability, the medical evidence compels a finding that the plaintiff has a permanent impairment rating as a result of the work injury of March 23, 2004. Plaintiff has, therefore, satisfied the threshold requirement for an award of permanent disability benefits.

Plaintiff contends that she is permanently and totally disabled as a result of the residual effects of the March 23, 2004 low back work injury. In support of that position plaintiff testified with regard to her constant low back symptoms and intermittent lower extremity symptoms which result in significant and severe functional limitations on sitting, standing, walking, and performing even routine

activities of daily living. Plaintiff testified that she is incapable of returning to any work on a full time basis at this time in light of the residual effects of her work injury. In support of her claim the plaintiff produced four lay witnesses at the Formal Hearing (her husband and three of her friends) who testified about their personal observations concerning the difference in the plaintiff's functional abilities and level of activity presently as compared with prior to the work injury. Likewise, the plaintiff has submitted medical evidence in the form of reports from her treating physicians which chronicle her ongoing symptoms and treatment as well as a report from evaluating physician Owen who assigns work restrictions. Finally, the plaintiff has submitted a vocational evaluation report from Betty Hale who concluded that, although plaintiff is literate at the college level in both reading and spelling and proficient at a post-high school level with respect to arithmetic, that she has a "severe work disability" from a combination of her ongoing physical and psychological impairments resulting in a substantial loss in earnings potential following the work injury.

The defendant, on the other hand, contends that the plaintiff is at most entitled to an award of permanent partial disability benefits based on the 8% impairment rating assigned by Dr. Kriss enhanced by the triple multiplier of KRS 342.730(1)(c)(1) having stipulated the plaintiff does not retain the physical capacity to return to the type of work that she was performing for the defendant at the time of injury. In support of its position that permanent disability

benefits should be limited to a permanent partial award, the defendant has submitted the report of its evaluating neurosurgeon, Timothy Kriss who, having thoroughly reviewed all of the plaintiff's relevant treatment records and having examined the plaintiff, is of the opinion that while plaintiff cannot return to her former job duties, she is "very employable" within permanent limitations of performing sedentary duties, activities that require standing/ambulation and are modestly physically demanding including no lifting more than 20 pounds and avoiding "unusually repetitive bending or twisting of the low back." According to Dr. Kriss there is no objective medical reason why the plaintiff cannot pursue any "white collar" or "largely cognitive occupation." Dr. Kriss indicates that it makes no sense that the plaintiff should avoid all work particularly at such a young age and "when her only significant medical problem is the axial back pain."

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 the 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."

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 342.011(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 home bound in order to be found to be totally occupationally disabled. See, *Osborne v. Johnson*, supra, at 803.

In considering the evidence presented in this claim in the context of the analysis of the *Hamilton* factors as set forth above, the ALJ notes that the plaintiff is a young person at only 38 years of age. According to her vocational expert, Ms. Hale, in the absence of a work disability, a person of the plaintiff's age, education and gender could expect to have a work life of 29.9 years. If she were to work to age 65 she would have a work life of 36 years. Clearly, considering the plaintiff's age she otherwise has a significant period of time within which she otherwise could participate in employment endeavors in the absence of

injury. Moreover, with respect to plaintiff's post-injury intellectual "status", both of the vocational evaluators, Hale and Conte, agree that the plaintiff demonstrates strong academic abilities testing out at the post-high school level in reading, spelling and arithmetic. Having had the opportunity to observe and interact to some extent with the plaintiff at both the Benefit Review Conference and the Formal Hearing, the ALJ found her to be extremely well spoken, intelligent and personable. No evidence has been presented to the effect that the work injury has in any way impaired plaintiff's intellectual abilities, and the ALJ is persuaded by the totality of the evidence, including the vocational reports submitted by the parties, that the plaintiff retains the intellectual capacity to participate in a wide variety of skilled occupations requiring significant intellectual acumen.

With respect to the plaintiff's post-injury emotional status, plaintiff testified that she experiences anxiety and depression which she attributes to her chronic pain condition. In his report of September 23, 2011, Dr. Owen reports that the plaintiff provided a history of current treatment with a nurse practitioner who prescribed a sleep aid as well as anti-depressants including Celexa and Buspar. No evidence has been submitted, however, to the effect that plaintiff has any emotional or psychological condition which restricts her activities in any way or which would preclude, impede or impair her from returning to the labor force.

With regard to the plaintiff's vocational history and status, the record reflects that the plaintiff was

initially employed as a telephone operator after she left school, a position which the undersigned infers required significant and continuous sitting. Thereafter the plaintiff worked for a brief while with a housecleaning crew which the ALJ infers required a wide variety of physical activities and postural maneuvering. Plaintiff also worked as a cashier in a liquor store which the ALJ infers involved significant standing. After the plaintiff returned to school and completed her Associates' degrees, however, she was immediately employed as a nuclear medicine technician first in the cardiac lab facility of Central Baptist Hospital and ultimately working for the defendant. Plaintiff testified with respect to her daily job duties and activities in her position with the defendant and that testimony established that some of the plaintiff's responsibilities involved fairly heavy lifting and that much of her time was spent on her feet. The parties have stipulated, however, that the plaintiff does not retain the physical capacity to return to the work that she was performing for the defendant at the time of injury. The plaintiff has demonstrated the ability to perform work requiring brain as well as brawn. Plaintiff's prior work history and demonstrated academic abilities would otherwise qualify her for a wide variety of occupational titles and vocational pursuits in the absence of any limiting physical condition. In this regard the ALJ acknowledges the reports and opinions of Dr. Conte and Ms. Hale to the effect that the plaintiff demonstrated the vocational aptitude to perform a variety of employment activities in the light and sedentary exertional categories.

The final, and most important aspect of the *Hamilton* factors in the context of the present claim requires an analysis of the plaintiff's post-injury physical status. The restrictions assigned by the parties' evaluators, Drs. Kriss and Owen, are fairly similar in that both would restrict lifting to no more than 20 pounds with Dr. Kriss indicating additionally the plaintiff should avoid unusually repetitive bending or twisting of the low back allowing for activities that require standing or ambulation. Dr. Owen was of the opinion that the plaintiff should avoid activity that requires recurrent bending, squatting or stooping in addition to the 20 pound limit on lifting, handling and carrying objects. Although he has not assigned specific work restrictions, Dr. James noted that the plaintiff reported numbness and paresthesias in the lower extremities, specifically the right lower extremity, and pain in her lower back which "prevents her from maintaining a constant position" as well as having difficulty with prolonged standing or walking. When he last saw the plaintiff on September 14, 2010, her treating neurologic surgeon, Dr. Gerber, was of the opinion that with the amount of narcotics she was taking and "incapacitating events related to her pain", plaintiff did not have the ability to return to work and he would "consider her permanently and totally disabled." It does not appear, however, that Dr. Gerber assigned specific restrictions.

In addition to the medical report pertaining to the plaintiff's residual functional capacity, the ALJ had the opportunity to observe the plaintiff during the course of the Formal Hearing. Plaintiff testified during the Formal

Hearing that she does not believe there is any work she could perform and described an existence in which her participation in activities of daily living is severely limited by virtue of her physical symptoms, primarily low back pain and spasms. Having had the opportunity to observe the plaintiff at the Formal Hearing, the ALJ noted that her presentation was one of extreme discomfort as she shifted in her seat almost immediately upon sitting down. Throughout the course of the hearing lasting approximately one hour, the plaintiff was noted to squirm and fidget constantly. She stood and moved about the hearing room several times while she and the other witnesses were testifying, and tried sitting in different chairs. Having had the opportunity to observe and hear the plaintiff testify at the Formal Hearing, the ALJ found her to be very credible in her description of the extent to which her back pain causes her to be unable to maintain a stationary position for any significant length of time. Likewise, the ALJ found the testimony of plaintiff's husband as well as witnesses Gilliam, Campbell and Lindsey to be very credible and persuasive. The flavor of the testimony of those witnesses is that the plaintiff is constantly "up and down" and as a result unable to engage in any activity on a significant, consistent and sustained basis. Plaintiff's credibility is likewise bolstered by the fact that she voluntarily weaned herself from narcotics over a year ago out of concern for the long term residual effects on her health in taking narcotic medication while recognizing that withdrawing the narcotic medication would result in an increase in her physical symptoms. The ALJ finds the plaintiff's testimony with respect to her physical condition, symptoms and

> residual functional limitations to be highly persuasive. *Hush v. Abrams,* 584 S.W.2d 48 (Ky. 1979). Simply put, it is difficult to imagine what type of work the plaintiff could participate in on a consistent full time basis in light of her constant moving, fidgeting and changing positions. In this regard it is significant to the ALJ that the plaintiff has not worked in eight years, during five of which she received temporary total disability benefit payments. Although there is certainly evidence as set forth above which would militate against a finding of permanent and total disability, the ALJ is persuaded that as a result primarily of the plaintiff's post-injury physical status and continuing symptoms that the plaintiff is permanently and totally occupationally disabled, and the ALJ so finds.

Kentucky Cardiology argues the ALJ improperly applied the methodology set forth in Watson in finding Elmore permanently totally disabled. Kentucky Cardiology notes that case requires consideration of the claimant's post-injury physical, emotional, intellectual and vocational status and an assessment of how those factors interact with one another. Kentucky Cardiology concedes the ALJ accurately detailed the facts but it contends the ALJ failed to adequately address the interaction of the factors. Kentucky Cardiology notes the ALJ concluded Elmore is young and demonstrates strong academic abilities. The ALJ specifically acknowledged there was no evidence to

demonstrate any restriction based upon her emotional or psychological condition.

Kentucky Cardiology also notes the ALJ stated he was persuaded that as a result primarily of Elmore's post-injury physical status and continuing symptoms she was permanently totally disabled. Kentucky Cardiology argues Elmore's physical condition alone is not sufficient to warrant an award of permanent total disability benefits. It contends the twenty pound lifting restriction imposed by the physicians would not be sufficient to meet Elmore's burden. Kentucky Cardiology concedes Elmore has pain sufficient enough to preclude her from returning to the work she performed at the time of her injury. However, Kentucky Cardiology argues:

> . . . finding permanent total disability based upon fidgeting at a Final Hearing and without determining how the fidgeting impacts her high level of academic and intellectual functioning, her emotional ability to work and function, and her wide vocational history and ability represents a gross misinterpretation of the law.

Kentucky Cardiology notes Elmore is a well-educated, outgoing, young woman who successfully overcame a prior lumbar fusion without ill effect and who, with proper vocational rehabilitation and work hardening, is

"predisposed to a successful employment with nearly guaranteed longevity."

Authority has long acknowledged an ALJ has wide ranging discretion in making a determination granting or denying an award of permanent total disability. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). Likewise, KRS 342.285 designates the ALJ as the finder of fact; therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. *See* Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ as fact-finder may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

In the case *sub judice*, despite Kentucky Cardiology's assertions to the contrary, the ALJ made sufficient findings in support of his conclusion Elmore is permanently totally disabled, and this determination is supported by substantial evidence in the record. The ALJ's decision must adequately communicate the evidence upon which he draws his ultimate

conclusions so the parties may discern the basis of his decision. However, he is not required to engage in a detailed "discussion and analysis of either the evidence or the law." Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 531 (Ky. 1973).

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 Elmore's age, education and past work experience, in conjunction with her post-injury physical status, the ALJ was persuaded Elmore is permanently totally disabled due to the effects of the work-related injury. The ALJ provided a detailed analysis of the factors enunciated in Watson, acknowledging certain factors would not favor a finding of permanent total disability. However, based upon the restrictions assessed by the physicians, Elmore's credible testimony regarding the effects of her injury on her functioning and the his observation of Elmore at the hearing, the ALJ determined Elmore was permanently totally disabled. It is readily apparent the ALJ weighed the factors enunciated in Watson and acknowledged "there is certainly evidence as set forth above which would militate against a finding of permanent and total disability."

However, when the ALJ weighed that evidence against Elmore's post-injury physical status and continuing symptoms, he was persuaded Elmore was permanently totally disabled. The ALJ was well within his role as fact-finder in making that determination.

Substantial evidence exists supporting the ALJ's conclusion. Restrictions assessed by Dr. Kriss and Dr. Owen would limit Elmore to sedentary activities. Based upon Elmore's testimony regarding limitations on sitting, standing and walking, the opinions of Ms. Hale, the vocational expert and the ALJ's observation of Elmore at the hearing, the ALJ was apparently convinced Elmore could not perform sedentary activities as a result of her inability to maintain any position for a significant length of time.

It does not matter that this Board or some other ALJ might have reached a different result. As long as the ALJ's conclusions are based on substantial evidence, we may not reverse. The ALJ acted within his discretion in rendering his decision. We cannot say the ALJ's decision was clearly erroneous or so unreasonable that it must be reversed as a matter of law. Therefore, we must affirm.

Accordingly, the May 21, 2012 Opinion, Award and Order rendered by Hon. Robert L. Swisher, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MELANIE B GABBARD
P O BOX 34048
LEXINGTON, KY 40588

COUNSEL FOR RESPONDENT:

HON KELLY P SPENCER
535 WELLINGTON WAY STE 330
LEXINGTON, KY 40503

ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511