Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 8, 2015

CLAIM NO. 201375117

LION APPAREL, INC. PETITIONER

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

LETHA SMITH
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Lion Apparel, Inc. ("Lion") appeals from the November 13, 2014 Opinion and Order and the December 23, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), finding Letha G. Smith ("Smith") permanently totally disabled. Lion argues the ALJ failed to perform an adequate

analysis in finding Smith permanently totally disabled and the finding is clearly erroneous, not based upon substantial evidence, and not in accordance with the law. For the reasons set forth herein, we affirm.

Smith testified by deposition on April 29, 2014 and at the hearing held October 22, 2014. Smith finished ninth grade and obtained a GED. She obtained a certificate as a Child Development Associate and as a CNA. Her employment history includes work as a teacher's assistant, family service advocate, receptionist and office manager for Speedy Cash. She was employed by Lion since June 2012 as a bar tacker, using a type of sewing machine to tack stress points on firefighter coats. She performed her work in a seated position in a swivel chair. Her work required frequent twisting, turning and lifting less than fifteen pounds. She also utilized a pedal to run the tacking machine.

On July 15, 2013, she was moving a coat and twisted. She felt a sharp pain in her low back. She was able to finish her shift that day, then went to the emergency room at the ARH in Morgan County where she was given a Toradol injection. Dr. Bethany Lucas prescribed the use of a cane. Smith attempted to return to work, but could only complete an hour on one day because of her pain.

Smith takes Flexeril and Lortab for her back condition. She takes Cymbalta for depression. She can stand for about thirty minutes and sit for about an hour. She can walk about a quarter of a mile. She stated she no longer goes hiking, line dancing, or walking in the park. She can no longer do much cooking or cleaning. She has difficulty sleeping and experiences anxiety and depression. She continues to have back pain right below the belt line that radiates down her legs to her knees.

Dr. Bruce A. Guberman examined Smith on May 14, 2014. He reviewed her medical records, physical therapy records following the injury, and MRI report. He diagnosed acute and chronic lumbosacral strain and post-traumatic disc protrusion at L5-S1. Dr. Guberman placed Smith in DRE lumbar category II and assigned an 8% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He did not believe Smith was capable of returning to the type of work she performed at the time of her injury. Dr. Guberman stated Smith has limitations in her ability to stand, walk, kneel, crawl, squat, lift, carry, push, pull, and climb ladders or stairs.

In a June 3, 2014 supplemental report, Dr. Guberman indicated he reviewed records from Cave Run

Surgical Specialties and a return to work slip from ARH Morgan County. The records did not affect his opinions expressed in his prior report. He noted the prior transient back pain Smith experienced in 2011 would not warrant an impairment rating pursuant to the AMA Guides.

Dr. James C. Owen performed an independent medical exam ("IME") on May 2, 2014. He diagnosed persistent discogenic low back pain with non-verifiable radicular symptomatology associated with dysmetria and muscle spasm. Dr. Owen stated the injury was the cause of Smith's symptoms, indicating the mechanism of injury was "excessive torsion torque" of the lumbar spine. Dr. Owen assigned an 8% impairment rating pursuant to the AMA Guides. He recommended Smith avoid activity that requires recurrent bending, squatting, or stooping; lifting more than twenty pounds; prolonged standing longer than five to ten minutes; and walking longer than five to ten minutes. He felt Smith needs chronic pain management.

Dr. Leigh Ann Ford, Ph.D., conducted a psychological examination on July 14, 2014. She diagnosed pain disorder, related to general medical condition; generalized anxiety disorder, with panic attacks; and depressive disorder, NOS. She assigned an 8% impairment rating for the psychological condition pursuant to the AMA

Guides, with 4% attributable to a pre-existing condition. She noted Smith experienced worsening symptoms of depression and new symptoms of anxiety after the workplace accident.

Dr. Henry Tutt performed an IME on May 21, 2014. Dr. Tutt opined there is no evidence Smith sustained "any structural alteration of the structural integrity of her lumbar spine" relative to the work event. Instead, he believed Smith sustained a lumbar strain/sprain or a transient myofascial injury and would have reached maximum medical improvement ("MMI") within approximately four weeks. Her continued complaints are completely inexplicable, non-correlative with her examination and imaging studies, and exceed any explanation based upon an anatomic source. Smith's unusual pain responses indicated a degree of symptom magnification. Dr. Tutt opined Smith sustained only a temporary injury that resolved with no impairment rating. In his opinion, Smith requires no restrictions or additional treatment and is fully capable of performing her usual job duties.

Dr. Tutt testified by deposition on June 12, 2014. He criticized Dr. Owen's diagnosis, characterizing it as merely a list of Smith's complaints. He further believed Dr. Owen assigned an impairment rating without a definitive diagnosis.

In a June 23, 2014 supplemental report, Dr. Guberman indicated he reviewed and disagreed with the report of Dr. Tutt. Dr. Guberman noted a majority of individuals with soft tissue injuries do improve and/or resolve within two months. However, a significant minority continues to have symptoms and findings beyond that time and tend to have a very chronic course. The medical records and history obtained from Smith do not indicate her condition resolved. Dr. Guberman reaffirmed his prior impairment rating.

Finally, in an August 19, 2014 supplemental report, Dr. Guberman disagreed with Dr. Tutt's addendum wherein he stated Smith would have qualified for lumbar DRE Category II for the back pain she experienced in 2011. He noted if the back pain resolved after four or five months, she would have 0% impairment once she had reached MMI.

Dr. Tutt responded to Dr. Guberman in a July 25, 2014 supplemental report. Dr. Tutt stated his review of the lumbar MRI revealed no evidence of a disc herniation or protrusion of clinical significance. He reiterated that Smith sustained no permanent injury.

Dr. Ellen M. Ballard performed an IME on January 30, 2014. Dr. Ballard opined Smith suffered a strain but the incident did not cause a medical change. She opined ongoing treatment is unnecessary and Smith should be able to

return to her regular job. In a July 7, 2014 addendum Dr. Ballard indicated she reviewed extensive medical records and diagnostic studies. She stated Smith has complaints of back pain with no objective findings and she had pre-existing complaints of back pain. Dr. Ballard opined the work incident did not cause a permanent injury or even a temporary injury that resolved. In her opinion, Smith has a 0% impairment rating pursuant to the AMA Guides.

In a July 14, 2014 supplemental report, Dr. Guberman indicated he reviewed Dr. Ballard's report and disagreed with her statement that the work incident did not cause a medical change. Dr. Guberman opined the work incident caused Smith's lumbar symptoms including pain radiating into her legs with numbness and tingling. Dr. Guberman noted he performed valid range of motion testing which represents objective abnormal findings associated with this injury. He stated Smith had sustained a permanent injury producing an 8% impairment rating pursuant to the AMA Guides.

Lion filed the August 19, 2014 report and September 15, 2014 deposition of Dr. David Shraberg who performed an IME on August 18, 2014. Dr. Shraberg noted Smith had a long history of mild non-disabling depression. Testing revealed symptom magnification. She has no

objective evidence of a psychiatric impairment that would preclude her ability to return to her usual and customary employment. Dr. Shraberg diagnosed adjustment disorder of adult life associated with divorce and secondary financial and occupational stressors, non-disabling. He also diagnosed elements of long-standing complicated grief reaction superimposed on chronic dysthymia, non-disabling. Dr. Shraberg assessed a 0% permanent psychiatric impairment pursuant to the AMA Guides. Smith's current treatment and medications are not related to her work incident.

Based upon Smith's testimony and the opinions of Drs. Guberman and Owen, the ALJ found Smith sustained a serious work-related injury to her low back. Based upon the opinion of Dr. Ford, the ALJ determined that, as a result of the physical injury, Smith developed depression and anxiety. The ALJ found Smith did not have a pre-existing active impairment or occupational disability. The ALJ accepted the 8% impairment rating for the low back assessed by Drs. Owen and Guberman. After setting forth the definition of permanent total disability, the ALJ provided the following findings:

> As noted above, based upon the credible and convincing lay testimony of Ms. Smith, which is covered above, and the persuasive and compelling medical evidence from both Dr. Owen and

Guberman, which is covered in detail above, I make the determination that Ms. Smith will have a serious permanent physical impairment due to her back injuries on July 15, 2013. The parties agreed that Ms. Smith last worked back on July 15, 2013, which is almost one and a half years ago. She is now 36 years of age, meaning that she is in early middle age in the work force. I make the factual determination that Ms. Smith has been referred to Dr. Tibbs, an outstanding neurosurgeon, for further treatment, that she experiences pain in her back which runs down both legs to her knees and her treating physician has prescribed for her a cane, which she has to use, and that she is taking prescription pain medications. She testified that standing, sitting and walking are very limited and that she has difficulty sleeping. She also experiences depression and anxiety. Dr. Owen stated that Ms. Smith has reached maximum medical improvement and that she needs and deserves chronic pain management, and further that she does not retain the physical capacity to return to the type of work that she performed at the time of her injuries. Dr. Owen placed upon the plaintiff stringent physical restrictions, and I make the determination that under those physical restrictions she cannot return to regular gainful employment. Dr. Guberman stated that based upon Ms. Smith's description of her prior job, he is of the opinion that she cannot return to that type of employment. Dr. Guberman placed upon Ms. Smith stringent physical restrictions, and I make the determination that with those physical restrictions she cannot return to regular gainful employment. As noted above, Ms. Smith's lay testimony is credible and convincing and is competent under the decision of the Kentucky

> Supreme Court in *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). Taking all of the above factors into consideration, I make the determination that Ms. Smith will not be able to return to any regular gainful employment in the highly competitive job market. Based upon all of the above factors, I make the determination that Ms. Smith cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the determination that she is permanently and totally disabled effective from and after July 15, 2013. Of course, if Ms. Smith's physical condition changes for the better, the defendant can always move to reopen under KRS 342.125.

Lion filed a petition for reconsideration raising the same arguments it makes on appeal. The ALJ in his Opinion and Order on Reconsideration again summarized Smith's testimony, characterized her as "very stoic" and again found her testimony credible and convincing. The ALJ discussed the evidence from Drs. Owen and Guberman, noting their recommended restrictions and diagnoses. He also considered Dr. Ford's opinion that Smith experienced a worsening of her psychological condition. The ALJ's additional findings regarding the factors he weighed in finding Smith permanently totally disabled included the following:

> . . . She attended school to the 9th grade and later obtained a CDA, a CNA and First Aid/CPR certification. Giving her the benefit of the doubt, she has

> average intellectual capacities. I carefully reviewed her work history since 1999, which has consisted of working as a teacher's assistant, a receptionist, an office manager and for the defendant, an apparel factory. Her vocational capabilities are at best average.

On appeal, Lion argues the ALJ's opinion is clearly erroneous on the basis of the reliable, probative, and material evidence and is a clearly unwarranted exercise of discretion. Lion contends the ALJ failed to provide sufficient analysis demonstrating how he weighed the factors in finding Smith permanently totally disabled as required by Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). According to Lion, the ALJ failed to adequately discuss the conflicting evidence and point to which portions of Smith's testimony or the opinions of Drs. Owen, Ford and Guberman were found persuasive.

At the outset, we note Smith successfully bore her burden of proving she is permanently totally disabled. Therefore, the question on appeal is whether substantial evidence supports 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).

Permanent total disability is 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 the injury. KRS 342.0011(11)(c). In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers' age, educational level, vocational skills, medical restrictions, and the likelihood he can resume some type of work under normal employment conditions. Ira A. Watson, 34 S.W.3d at 51. The ALJ has wide ranging discretion in making a determination granting or denying an award of permanent total disability benefits. 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).

Based upon the medical evidence and restrictions therein, as well as Smith's testimony, the ALJ could reasonably conclude Smith was not capable of performing work on a regular and sustained basis in a competitive economy. KRS 342.0011(11)(c). Smith's testimony, along with the medical opinion of Drs. Guberman and Owen, constitutes the requisite substantial evidence to support the ALJ's

decision. Dr. Owen assigned significant restrictions, including limiting her to standing or walking only five to ten minutes at a time. Dr. Ford's testing revealed a full scale IQ of 83, which falls within the low average range at the 13th percentile.

Additionally, a claimant's own testimony as to her condition has some probative value and is appropriate for consideration by the ALJ. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). Smith testified the majority of her work involved sitting for an extended period of time constantly manipulating firemen's coats. Her testimony indicates she would have difficulty standing, walking or sitting for extended periods. The ALJ could reasonably conclude Smith's limitations would affect any level of employment, including even the clerical work she has previously performed.

Lion has raised legitimate arguments which support the conclusion Smith is not permanently totally disabled. However, it is within the exclusive province of the ALJ to weigh the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). This Board may not superimpose its own assessment of the proof and reach alternate conclusions, even when significant evidence supports a different result. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Our review is limited solely to

whether substantial evidence supports the ALJ's findings. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Upon review of the totality of the evidence, we cannot conclude the decision of the ALJ finding Smith entitled to an award of permanent total disability benefits is so unreasonable under the evidence that the decision must be reversed as a matter of law. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Furthermore, we are convinced the ALJ considered all of the evidence and weighed the factors enunciated in Ira Watson Dept. Store v. Hamilton. Reading the Opinion and Order together with the Opinion on Reconsideration, the ALJ has adequately articulated his consideration of Smith's age, her education, her cognitive ability, her work history, and her physical condition. The ALJ is not required to set forth the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

Accordingly, the November 13, 2014 Opinion and Order and the December 23, 2014 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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