Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 6, 2013

CLAIM NO. 201286382

MEIJER, INC. PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

GERALDINE M. JONES
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * * *

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

ALVEY, Chairman. Meijer #166 ("Meijer") seeks review of the opinion and award rendered August 6, 2013 by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), awarding Geraldine Jones ("Jones") permanent total disability ("PTD") benefits and medical benefits due to the work-related right shoulder and cervical spine injuries she sustained on April

16, 2011. Neither party filed a petition for reconsideration.

On appeal, Meijer argues the award of PTD benefits is not based upon credible evidence and the ALJ ignored the overwhelming evidence to the contrary. Meijer also argues the ALJ erred in awarding lifetime PTD benefits pursuant to KRS 342.730(4). Because the ALJ's determination of permanent total disability is in accordance with Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000) and is supported by substantial evidence, we affirm this determination. We vacate and remand regarding the duration of PTD benefits, though for reasons different from those cited by Meijer.

Jones testified by deposition on March 14, 2013 and at the hearing held June 26, 2013. Jones was born on May 19, 1951 and resides in Louisville, Kentucky. She completed the 9th grade and does not have a GED. She is right hand dominant. She has no additional specialized or vocational training. She was employed as a cashier for a department store from 1979 to 1984, and pulled various automobile parts for a distribution center from 2000 to 2002. Jones confirmed she had large gaps in employment from 1984 to 2000 and again from 2002 to 2010 to either care for her children or her husband.

Jones began working for Meijer on November 10, 2010. She was initially a cashier for approximately two weeks, then became a hard lines general merchandise clerk where she worked in the fish, lighting, automotive, toys and seasonal departments. She straightened merchandise, placed returned items back on the shelves, assisted customers, and retrieved merchandise which required the use of both arms. Jones stated her job required repetitive use of her upper extremities.

Jones testified that on April 16, 2011, she caught the bottom of a pallet, causing her to fall. Jones stated she heard her right arm snap as she attempted to break her fall. Her right arm and neck started to burn, she experienced pain in her right wrist, and developed a headache. Jones was transported by ambulance to Audubon Hospital where x-rays were taken, and she was placed in a sling. She was referred to BaptistWorx where she was referred to Dr. Bill Renda, an orthopaedic surgeon, who performed two surgical procedures on her right shoulder. The first procedure was performed in May 2011 to repair a torn rotator cuff. Dr. Renda referred Jones to Dr. John Guarnaschelli, a neurosurgeon, for evaluation of her neck. Jones sought a second opinion from Dr. Gregory Nazar, who referred her to pain management.

She was restricted from work by Dr. Renda from April 16, 2011 to September 25, 2011, then released to light duty work with no overhead reaching or lifting over five pounds. Jones testified she originally returned to hard lines, but in January 2012, moved to soft lines which included the fashion and baby departments. At her deposition, Jones testified she folded clothes and straightened products in soft lines. At the hearing, Jones stated she was a “thrower” and was required to store and stock freight.

Jones testified in February 2012, her right arm started burning after she picked up a stroller. Jones admitted she did not report the incident and continued to work without seeking treatment until May 2012 despite worsening symptoms.

Jones returned to Dr. Renda in May 2012, who performed surgery on August 1, 2012 to repair a torn bicep tendon. Jones was again restricted from work from May 5, 2012 to September 21, 2012, when she was released to light duty work with the same restrictions as before. Meijer initially placed her as a door greeter but she was later moved back to the fashions department to fold and straighten clothes despite persistent pain. Jones testified she voluntarily quit on April 17, 2013 due to her pain and

stated she “felt like I couldn’t fulfill the duty I was hired for.” Jones stated that during her employment, Meijer had always accommodated her light duty restrictions. Following each surgery, Jones returned to work at a weekly wage equal to or greater than her wage at the time she was injured on April 16, 2011.

Jones testified she experiences constant pain, as well as spasms and tingling from below her shoulder to her fingers when she walks with her right arm at her side. Therefore, she walks with her right hand on her abdomen. Jones has difficulty sleeping and described her struggles completing daily activities such as yard work and household chores due to her limited use of her right extremity. Due to her limitations and restrictions, Jones testified she is unable to return to Meijer as either a hard line or soft line general merchandise clerk, and believes she is incapable of performing any work activities on a sustained and indefinite basis.

Jones denied any previous injuries or problems with her right extremity or neck. She takes only medication to treat high blood pressure and diabetes. Jones testified she has been denied Social Security Disability benefits on at least two prior occasions in 1999 and 2006. She again applied for Social Security Disability benefits after

quitting her job at Meijer but was denied because “I don’t work enough hours to get enough units.”

In support of her claim, Jones filed medical notes from Drs. Guarnaschelli and Nazar. On July 16, 2012, Dr. Guarnaschelli noted Jones’ complaint of cervical pain began when she fell at work. His examination revealed primarily a shoulder pathology rather than a cervical disc pathology, and he ordered further diagnostic testing to rule out cervical disc disease. On February 15, 2013, Dr. Nazar noted complaints of neck and arm, numbness, tingling, and weakness. He noted Jones’ treatment with Dr. Renda. He noted the January 23, 2013 MRI demonstrated a central chronic disc protrusion/herniation at C6-7 level producing moderate spinal stenosis. Dr. Nazar recommended conservative treatment for her cervical symptoms and referred Jones to pain management, opining he was doubtful surgical intervention would be beneficial.

Jones also filed the January 23, 2012 report of Dr. Jerry Morris. He noted the April 16, 2011 work accident and subsequent treatment, including the two surgeries performed by Dr. Renda. Jones’ complained of right shoulder pain, pain radiating from her neck to her fingers of her right hand, right arm and grip weakness, and decreased range of motion in her neck. Dr. Morris diagnosed traumatic right

shoulder rotator cuff tear; right brachial plexus injury; cervical spine sprain; aggravation of right shoulder arthritis and bursitis; aggravation of cervical spine spondylosis and osteoarthritis; and aggravation of cervical disc protrusion, all due to the April 16, 2011 work injury. Dr. Morris found Jones was at maximum medical improvement ("MMI"). He recommended pain management and additional imaging studies, including a cervical spine MRI and brachial neurography. Dr. Morris assessed a 36% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), apportioning 20% for the right upper extremity, 16% for the cervical condition and 3% for pain. Dr. Morris permanently restricted Jones from lifting over five pounds occasionally and two pounds frequently; carrying over two pounds occasionally and one pound frequently; lifting from the ground or waist to above the shoulder; avoid crawling; and only occasionally push, pull, kneel, pinch and grasp. Dr. Morris opined she is unable to return to her pre-injury work activities. In a January 30, 2013 addendum, Dr. Morris noted his opinions remain unchanged after reviewing the January 23, 2013 cervical spine and right brachial plexus MRI reports.

Meijer filed the June 5, 2013 report of Dr. Gregory Gleis. He noted the April 6, 2011 work accident and subsequent treatment for Jones' right shoulder and cervical spine. She complained of neck, shoulder and right arm pain and numbness. Dr. Gleis diagnosed right shoulder rotator cuff-supraspinatus tendon tear and bicep proximal tendon partial tear, "20-30% treated with debridement". He found Jones' neck injury not work-related since there were no reported complaints until July 18, 2011 and also because the July 26, 2011 cervical MRI demonstrated degenerative changes without focal findings which would cause radiculopathy. Dr. Gleis stated Jones had reached MMI and he deemed no additional treatment necessary for her right shoulder, biceps or cervical spine condition. Dr. Gleis recommended restrictions of no lifting over five pounds to shoulder level and no reaching overhead. Dr. Gleis assessed a 9% impairment rating based on the AMA Guides for Jones' right shoulder condition and a 0% impairment rating for the neck condition.

A benefit review conference ("BRC") was held on June 11, 2013. The BRC order reflects the following contested issues: benefits per KRS 342.730 (all factors), work-relatedness/causation regarding the cervical spine,

average weekly wage, unpaid or contested future medical benefits, TTD, and permanent total disability.

In the August 6, 2013 opinion and award, the ALJ found Jones sustained a "cervical sprain and aggravation of cervical spine spondylosis and disc protrusions along with the injury to her rotator cuff and brachial plexus at the time of the April 16, 2011 work related injury." Based upon her age, education level, vocational skills, medical restrictions, and the likelihood she can return to some type of work with normal restrictions, the ALJ determined Jones is permanently totally disabled. He specifically found as follows:

> In this particular instance, the defendant points out the plaintiff had applied for Social Security disability even prior to this injury as she had non-work-related conditions including diabetes and high blood pressure. However, the evidence indicates that the plaintiff was able to obtain employment with the defendant and work from November 2010 until her injury of April 16, 2011 without being under restriction for those pre-existing conditions. The evidence also indicates the plaintiff now suffers from a great deal of pain in her cervical spine area as well as her right upper extremity. She holds her hand across her abdomen and utilizes her non–dominant hand in most of her activities. The pain in her right upper extremity makes it difficult for to sleep at night and she has burning and spasms in her right arm. While the plaintiff was able to

return to light duty work on two occasions following her injury, she stopped that work when she realized she was not able to perform her job duties. As a result of her work injuries as noted by Dr. Morris, she is disqualified from her pre-injury work activities and is, in fact, limited to lifting no more than 5 pounds occasionally and carrying no more than 2 pounds occasionally or 1 pound on a frequent basis. She has been assessed with an impairment rating of between 9% and 36%. When I consider the fact that the plaintiff was 60 years old [sic] the time of her injury and is now age 62 and has only a night[sic] grade education with no specialized or vocational training along with the work restrictions placed upon her by Dr. Morris, I am firmly convinced that she meets the definition of permanent total disability as that term is defined above. In making this determination, I consider all the factors set forth in *Ira A. Watson Department Store v. Hamilton,* Id.

The plaintiff testified that she does not qualify for Social Security benefits as she had not paid in enough quarters. I note that her work history indicates that she stayed at home to care for her husband and children for long periods of time and only worked sporadically from 1979 through the date of her work injury. If an individual does not qualify or will not qualify to receive old age social security benefits, his award is not limited in duration as set forth in *KRS 342.730(4); Auto Zone v. Brewer,* 127 S.W. 3d 653 (Ky. 2004). Given the fact that the plaintiff does not qualify and will not qualify for Social Security due to her eligibility status, she is entitled to have her award of permanent

> total disability payable for so long as she remains permanently and totally disabled. As the plaintiff was able to work at her light duty employment from September 25, 2011 through May 4, 2012 and again from September 21, 2012 through April 17, 2013, the benefits are suspended during these weeks of employment.

The ALJ awarded medical expenses and PTD benefits beginning on April 16, 2011 “for so long as she remains permanently totally disabled” but suspended and extended by the period of employment beginning on September 25, 2011 through May 4, 2012 and again from September 21, 2012 through April 17, 2013. Neither party filed a petition for reconsideration.

On appeal, Meijer argues substantial evidence does not support the ALJ’s determination Jones is permanently totally disabled. It asserts Jones returned to work with restrictions which were accommodated by Meijer and no evidence establishes she cannot continue working in this capacity. Meijer argues Jones voluntarily quit her position, did not submit any medical evidence demonstrating she is incapable of continuing to work, and her restrictions do not preclude her from performing all work. Meijer also asserts Jones’ unrelated conditions, including diabetes and high blood pressure, have kept her from working in the past.

Meijer also asserts the ALJ erred in awarding lifetime PTD benefits since his acceptance of Jones' unsubstantiated testimony she is ineligible for Social Security benefits was in error. Meijer states this issue was not raised by Jones until the hearing and no documentation to support her testimony was offered. Therefore, Jones failed to meet her burden of proof and the ALJ erred in awarding her lifetime benefits contrary to the limitations found in KRS 342.730(4).

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

The crux of this appeal concerns whether the ALJ's determination of PTD benefits is supported by substantial evidence. Authority has long acknowledged that in making a

determination granting or denying an award of permanent total disability, an ALJ has wide ranging discretion. 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. 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). Although a party may note evidence supporting a different outcome than 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). 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).

Additionally, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is

limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

In support of its argument the ALJ erred by awarding PTD benefits, Meijer merely points to evidence which could have produced a contrary result. This is an insufficient basis for setting aside the ALJ's determination. After reviewing the evidence of record, we conclude the ALJ's determination Jones is permanently totally disabled was in accordance with the Kentucky

Supreme Court's holding in Ira A. Watson Department Store v. Hamilton, supra. Taking into account Jones' age, education and past work experience, in conjunction with her post-injury physical status, along with Dr. Morris' report, the ALJ was persuaded Jones is totally disabled due to the effects of the work-related injury.

The ALJ relied upon Jones' testimony regarding her current condition and pain level, as well as the fact she is now required to use her non-dominant in many of her activities. He also relied upon Jones' testimony she quit her position with Meijer due to her inability to perform her job duties there or anywhere on a sustained and indefinite basis. We emphasize Jones' testimony regarding her post-injury ability to work and her level of pain constitutes substantial evidence, as an injured worker's testimony is probative of his or her ability to labor post-injury. *See* Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); *See also* Carte v. Loretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky. App. 2000). The ALJ also relied upon Dr. Morris' restrictions of lifting no more than five pounds occasionally and carrying no more than two pounds occasionally or one pound on a frequent basis. Finally, the ALJ noted Jones was sixty years old at the time of her injury and is now sixty-two, and has a limited education.

The above constitutes substantial evidence supporting the ALJ's determination of permanent and total disability, and we are without authority to disturb his decision on appeal. *See* KRS 342.285; Special Fund v. Francis, supra.

That said, we vacate the ALJ's determination regarding the duration of PTD benefits. The ALJ determined the limitations set forth in KRS 342.730(4) did not apply based on Jones' testimony she did not qualify for Social Security benefits since she had not paid in enough quarters. He therefore awarded PTD benefits "for so long as she remains permanently totally disabled." The ALJ was without authority to make such a determination. On remand, the ALJ shall award PTD benefits beginning on April 16, 2011, which "shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever occurs last." KRS 342.730(4). The termination of payment of the PTD benefit award shall terminate only if and when she actually qualifies for normal old-age Social Security retirement benefits. We note the criteria for entitlement to Social Security Disability benefits is not the same as required for entitlement to old-age retirement benefits.

No evidence has been submitted establishing Jones is ineligible to receive normal old-age Social Security retirement benefits.

Accordingly, the August 6, 2013 opinion and award rendered by Hon. John B. Coleman, Administrative Law Judge, is hereby **AFFIRMED IN PART, VACATED IN PART AND REMANDED** for entry of an amended award in conformity with the views expressed herein.

ALL CONCUR.

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