Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 8, 2013

CLAIM NO. 201288611

MIGUELINA RICARDO-CRUZ PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

PREFERRED STAFFING, LLC
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

STIVERS, Member. Miguelina Ricardo-Cruz ("Ricardo-Cruz") appeals from the April 29, 2013, opinion, order, and award of Hon. Grant S. Roark, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Ricardo-Cruz sustained a low back injury on August 12, 2011, while in the employ of Preferred Staffing,

LLC ("Preferred Staffing"). Ricardo-Cruz also appeals from the June 17, 2013, order overruling her petition for reconsideration. On appeal, Ricardo-Cruz argues the ALJ erred in failing to find her totally occupationally disabled due to her injury.

Ricardo-Cruz, born September 29, 1960, came to the United States in 2006. She graduated from high school in Cuba, but has no formal education above the high school level and no special training. Ricardo-Cruz's first job in the United States involved working for JBS Swift & Co. for approximately seven months. She then worked a few months at Churchill Downs walking horses. She then worked for Delta Staffing, a temporary agency, in 2009 and 2010. In 2010, Ricardo-Cruz left Delta Staffing and went to work for Staffing, another temporary agency. She began working for Preferred Staffing, also a temporary agency, in December 2010 where she was employed until injured on August 12, 2011. At the time she was injured, Ricardo-Cruz had been assigned to work at Alliance Entertainment.

On the date Ricardo-Cruz was injured, she was lifting boxes containing compact discs and placing them on a table. When she squatted to pick up the last box which

weighed fifty-three pounds, she felt a sharp pain.[1] The pain became sharper when she placed the box on the table. Three days later, on August 15, 2011, Ricardo-Cruz was formally hired as an employee of Alliance Entertainment. She worked for Alliance Entertainment from August 22, 2011, until February 21, 2012. The entire time she worked for Alliance Entertainment she performed the same job. She did no lifting because her co-workers did all the lifting for her. When she was injured she saw her family physician, Dr. Juan Polo who referred her to Dr. John Dimar, an orthopedic surgeon, with Norton Leatherman Spine Center. She explained because Alliance Entertainment would not "allow the restrictions" she went home. Ricardo-Cruz acknowledged she had no work restrictions until April 5, 2012, when Dr. Dimar told her she could no longer perform her current job. Dr. Dimar later referred her to Dr. Vinayakin for pain management.

Ricardo-Cruz believes she cannot return to the work she performed while working for Preferred Staffing. She testified she stopped working because of the pain. She cannot bend, turn, or lift "any kind of weight." Her pain extends from her back into her foot. She experiences numbness in one toe. Ricardo-Cruz drives an automobile for

[1] Ricardo-Cruz explained each box had the weight written on the box.

approximately twenty or thirty minutes, does a “small amount of dishes” and no laundry. She is unable to shop for groceries and has problems sleeping because of the lower back pain. At the February 26, 2013, hearing, she testified she uses a cane at all times because her left leg “fails [her].” Ricardo-Cruz testified she is almost an invalid and consequently totally disabled. She takes Hydrocodone, Celebrex, and Amitriptyline to combat the effects of the injury.

Ricardo-Cruz relied primarily upon the August 27, 2012, report of Dr. Warren Bilkey and the records of Dr. Dimar. Preferred Staffing introduced various medical records relating to Ricardo-Cruz’s pre-injury and post-injury medical treatment as well as the October 24, 2012, report of Dr. Gregory Gleis.

Rejecting the opinions of Dr. Gleis and relying upon the opinions of Dr. Bilkey, the ALJ determined Ricardo-Cruz sustained a work-related low back injury finding as follows:

> As an initial threshold issue, the employer disputes plaintiff suffered any permanent neck or lower back injuries due to any work incident or activities. It argues plaintiff has no objective findings of an injury that can be causally related to any work incident of August 12, 2011. In support of its position, the defendant

> relies upon the opinions of its expert, Dr. Gleis, who observed multiple positive Waddell findings and inappropriate pain behaviors. Further, Dr. Gleis concluded plaintiff had no objective evidence of any lumbar or cervical injury to support a diagnosis of work-related injury. Conversely, plaintiff relies upon the opinion of plaintiff's expert, Dr. Bilkey, who assigned a 7% impairment rating based on his clinical examination findings.
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> Having reviewed the evidence of record, the Administrative Law Judge is persuaded by the clinical findings of Dr. Bilkey that plaintiff suffered a permanent lumbar injury beyond that which may have pre-existed the August 12, 2011 work incident. In reaching this conclusion, it is noted that, although plaintiff has only minimal diagnostic study findings, plaintiff's clinical examination findings by both Dr. Bilkey and Dr. Dimar support a finding of at least a mild permanent injury. Therefore, based on the opinions of Dr. Bilkey, it is determined plaintiff suffered a permanent lumbar injury within the meaning of KRS 342.0011(1) due to the lifting incident at work on August 12, 2011.

However, based upon the opinions of Dr. Gleis, the ALJ concluded Ricardo-Cruz did not sustain a cervical injury. In concluding Ricardo-Cruz is not totally occupationally disabled and retained the physical capacity to return to the job she was performing at the time of the injury, the ALJ reasoned as follows:

> The parties also dispute the extent and duration of plaintiff's impairment or disability. Plaintiff maintains she is totally disabled as a result of her injuries, while the defendant argues plaintiff has no impairment. Having reviewed the evidence of record, the Administrative Law Judge is persuaded that plaintiff is not totally disabled. Although it has been determined plaintiff suffered a permanent lumbar injury, the fact remains plaintiff has only minimal lumbar findings and the Administrative Law Judge was not persuaded by plaintiff's presentation of her alleged limitations at the final hearing. In this regard, Dr. Gleis' opinion that plaintiff can work without restrictions is considered most credible. As such, plaintiff is not permanently and totally disabled.

The ALJ concluded Ricardo-Cruz's employment ceased at the same or greater wages "for reasons related to her injury" and enhanced the PPD benefits by the two multiplier. The ALJ awarded PPD benefits for 425 weeks beginning on the date of injury with the PPD benefits being suspended during the period TTD benefits were awarded.

Preferred Staffing filed a petition for reconsideration asserting the ALJ erred in awarding enhanced benefits from the date of injury. Rather, it contended Ricardo-Cruz was only entitled to enhanced benefits beginning February 21, 2012, when her employment at the same or greater wages ceased.

Ricardo-Cruz filed a petition for reconsideration asserting the ALJ misinterpreted the medical and lay evidence concerning her allegation of permanent total disability. She cited to the fact she was fifty-two years old, has a high school diploma, and is illiterate in English. She discussed the physical problems she currently experiences. Significantly, although she maintained the ALJ committed error by failing to make appropriate findings, she did not request additional findings on this issue.

Alternatively, Ricardo-Cruz asserted the ALJ misinterpreted the medical and lay evidence concerning the application of the three multiplier. She insisted she was unable to perform her prior job duties on a sustained and indefinite basis as evidenced by the fact she was unable to perform her job when she returned to work and had to quit.

Concerning Preferred Staffing's petition for reconsideration, by order dated June 19, 2013, the ALJ corrected the award of PPD benefits to reflect Ricardo-Cruz's benefits would be enhanced from and after February 21, 2012.

By order dated June 17, 2013, the ALJ overruled Ricardo-Cruz's petition for reconsideration finding no patent errors justified the relief sought. The ALJ noted

in determining Ricardo-Cruz was not totally disabled he found her "presentation of her limitations" not credible and Dr. Gleis' opinion she could work without restrictions more credible.

On appeal, Ricardo-Cruz again argues she is fifty-two years old, has a high school diploma, and is illiterate in English. She contends her lumbar injury causes pain extending down her left leg. As a result, she has to walk with a cane "because her leg goes out" and has difficulty performing her daily activities. She posits she would have "immense difficulty finding alternative work." Accordingly, Ricardo-Cruz argues the ALJ misinterpreted the medical and lay evidence. Although she returned to work after her injury, she maintains she stopped working on February 21, 2012, because of her ongoing pain and symptoms. Ricardo-Cruz notes although Dr. Dimar concluded she is not a surgical candidate, he stated she had degenerative disc disease of the low back with disc protrusions causing ongoing pain. She argues the medical and lay evidence compel a different conclusion. Thus, the ALJ committed reversible error in failing to award permanent total disability benefits and remand is necessary for the appropriate findings and award.

A claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since the ALJ deemed Ricardo-Cruz unsuccessful in her burden of proving total occupational disability, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, 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 that is 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 Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, the ALJ reviewed the evidence and determined based on a compensable lumbar injury, Ricardo-Cruz was not totally occupationally disabled. While consideration of a total disability award depends on many of the same factors enunciated in Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), it remains within the broad authority of the ALJ to translate an impairment rating into either partial or total disability. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The factors which the ALJ may consider in making the determination include the worker's post-injury physical, emotional, intellectual and vocational status and how those factors interact. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

Although the ALJ's findings on this issue are limited, we note Ricardo-Cruz does not argue the ALJ's findings are deficient but rather he misinterpreted the medical and lay evidence in failing to find her totally occupationally disabled and points to the evidence in the record which would support a finding of total occupational disability.

As noted by the ALJ, Ricardo-Cruz has only minimal lumbar findings, and this is exemplified in Dr. Dimar's medical records. In a report dated March 16, 2012, Dr. Dimar noted Ricardo-Cruz complained of radiculopathy extending into her leg. As a result, an MRI of the low back was obtained which revealed some mild degenerative disc disease with some protrusion but no herniation. Dr. Dimar noted the foramina and central canal were open, and upon examination Ricardo-Cruz did not exhibit radiculopathy and had good circulation. His plan was to send her to pain management which included epidural injections. Dr. Dimar concluded surgery would not benefit her and referred Ricardo-Cruz to Dr. Vinayakin for pain management. Dr. Dimar stated as follows: "I kept her off work for another three weeks, and then I will leave this up to his discretion, but she probably will have to return to work." Similarly, Dr. Dimar's May 29, 2012, note reflects he

believed he had nothing to offer Ricardo-Cruz. She had no ruptured disc in the low back and would not benefit from surgery. Although she complained of chronic back pain, her MRI revealed some mild degenerative disc disease "with no collapse," good lordosis and no central or foraminal stenosis. On examination, he noted Ricardo-Cruz had good sagittal and coronal balance, a decent range of motion in her back, and is neurologically and vascularly intact. Dr. Dimar returned Ricardo-Cruz to Dr. Polo for "some mild pain medication, anti-inflammatory medication or work restrictions and/or to pain management." Also within Dr. Dimar's records is a return to work note dated January 10, 2012.

Dr. Gleis' October 24, 2012, report reflects his examination of Ricardo-Cruz revealed no muscle spasm, muscle guarding, or dysmetria. Her range of motion was self-limited in all directions. With regard to lumbar flexion, she had normal rhythm between the isolated lumbar, hips, and pelvis. Dr. Gleis observed she was positive for all five Waddell criteria. Upon reviewing the MRI of her lumbar spine, Dr. Gleis found no evidence of surgical lesion. He placed Ricardo-Cruz at maximum medical improvement on February 21, 2012. Dr. Gleis agreed with Dr. Dimar's diagnosis of low back and neck pain and his

assessment surgery is not indicated. With respect to physical restrictions, he noted Ricardo-Cruz's subjective complaints were very high and she had self-limited range of motion and strength testing and a non-physiologic sensory examination. Therefore, Dr. Gleis concluded there are "no objective physical exam findings" that would require restrictions. However, because she has very high subjective complaints and high pain behaviors, he did not believe Ricardo-Cruz could safely work in more than a light duty situation. Dr. Gleis added when Ricardo-Cruz demonstrates she can work "safely" and not place herself or her co-workers at increased risk, "she should be capable of doing a regular duty job without restrictions."

The opinions of Dr. Gleis and the fact Ricardo-Cruz had minimal lumbar findings as recounted herein constitute substantial evidence supporting the ALJ's determination she is not permanently and totally disabled. The fact Ricardo-Cruz can point to evidence in the record which would support her position does not compel such an award. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As stated by the Kentucky Supreme Court in Ira A. Watson Department Store v. Hamilton, supra, "[t]he crux of the inquiry on appeal is whether the finding which was made

is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law."

Clearly, the ALJ believed Ricardo-Cruz had sustained a low back injury as evidenced by his acceptance of Dr. Bilkey's opinion. However, after taking into consideration her minimal lumbar findings and Dr. Gleis' opinion, the ALJ determined Ricardo-Cruz is not totally occupationally disabled. Although Ricardo-Cruz argues the ALJ misinterpreted the medical and lay evidence, she does not point to any particular evidence which the ALJ misinterpreted. Further, Ricardo-Cruz does not contend the minimal lumbar findings and Dr. Gleis' opinion do not constitute substantial evidence in support of the ALJ's decision. Although the ALJ did not specifically discuss Ricardo-Cruz's academic abilities and educational level, he did assess her physical condition and the conflicting medical evidence and determined, based upon Dr. Gleis' opinion and the fact she had minimal lumbar findings, Ricardo-Cruz was not totally occupationally disabled.

In addition, in the June 17, 2013, order overruling Ricardo-Cruz's petition for reconsideration, the ALJ added he did not find her hearing testimony credible. There is no question the ALJ is the sole judge of a witnesses' credibility. Likewise, it is within the ALJ's

discretion to determine the medical evidence upon which he relies. In exercising his discretion, the ALJ concluded Ricardo-Cruz was not credible and the opinions of Dr. Gleis regarding her physical restrictions and capabilities was credible. The ALJ acted within his authority and translated Dr. Bilkey's impairment rating into an award for permanent partial disability rather than an award for permanent total disability. While Ricardo-Cruz's testimony may have supported an award of total disability benefits, contrary to her assertion, we do not believe the evidence is so overwhelming so as to compel a finding in her favor. As reviewed above, because this Board has no fact-finding function, and the ALJ made sufficient findings to support his decision which is supported by substantial evidence in the record we are without authority to direct a different result. Special Fund v. Francis, supra and KRS 342.185.

Accordingly, the April 29, 2013, opinion, order, and award and the June 17, 2013, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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