OPINION ENTERED: March 23, 2012

CLAIM NO. 201080565

ROSA LYNN DAVIS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

PARKWAY REHABILITATION & NURSING CENTER
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Rosa Lynn Davis ("Davis") seeks review of a decision rendered November 18, 2011, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") dismissing her claim for income benefits and future medical benefits against Parkway Rehabilitation & Nursing Center ("Parkway").

The Form 101 alleges on May 14, 2010, Davis sustained a low back injury “while moving quickly to assist patient.” The Form 101 also indicated co-employment at Walgreens.

Davis testified by deposition on April 11, 2011, and at the September 20, 2011, hearing. Davis testified she was employed by Parkway as a Certified Nurse Assistant (“CNA”). At the time of the injury, she had been working thirty-two hours per week at Parkway. Davis also worked thirty to thirty-five hours at Walgreens as a Certified Pharmacy Technician. Davis explained she was injured while assisting a patient in taking a shower. After Davis placed the patient in the shower, the patient started screaming because the water was ice cold. In the course of turning the shower head away from the patient and getting the patient out of the shower, Davis felt a jerk in the middle of her back and pain in her lower back above the waist. Even though she was in pain, Davis made sure the patient was cared for and put in bed. Davis finished her shift. When she woke up the next afternoon, she could not get out of bed. Davis testified her whole body was sore and her back ached. When she went to work at Parkway that evening, she realized she could not work and reported her injury to her supervisor. Parkway sent her to Dr. John L. Markert,

who treated her for this injury. She last worked for Parkway on November 29, 2010. Davis still works approximately thirty hours per week for Walgreens and attends ITT in order to obtain her Master's Degree as a Registered Nurse.

Davis filed the August 2, 2011, report of Dr. Warren Bilkey generated after conducting an independent medical evaluation ("IME") on that same date. Parkway filed the June 1, 2011, IME report of Dr. Robert A. Jacob and the records of Drs. Gregory B. Nazar and John L. Markert.

In the November 18, 2011, opinion and order, the ALJ determined as follows:

> The first issue for determination is whether the Plaintiff suffered an injury as defined by the Act which encompasses the issue of whether or not her current lumbar spine condition is causally related to her work.
>
> KRS 342.0011(1) defines injury as meaning, "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." The Plaintiff bears the burden of proof and risk of non-persuasion in each and every element of her case. *Snawder vs. Stice*, 576 SW2d 276 (KY App. 1979). *Jones vs. Newberg*, 890 SW2d 284 (KY 1994).

Ms. Davis argues in [sic] May 14, 2010, she suffered a work-related injury to her lumbar spine while she was helping bathe an elderly patient and felt a pull or catch in her back. She argues that as a result of her injury, she suffers from chronic and debilitating pain that is constant. She argues that she has difficulty standing for any length of time, sitting for any length of time, and bending. She supports her position with testimony from Dr. Bilkey who opines that she suffers from a right lumbar strain, and sacroiliac dysfunction along with a concern of potential instability of the L5-S1 disk level associated with retrolisthesis.

However, Ms. Davis was able to continue working at Parkway Rehabilitation and Nursing Center without restrictions only missing a week of work from May of 2010 through November of 2010 when she was terminated. She was also able to continue working at Walgreens as a pharmacy tech, a job which requires her to be on her feet most of the time. In addition, she was attending school at ITT Tech study [sic] nursing.

Parkway Rehabilitation and Nursing Center argues Ms. Davis has not met her burden of proving a [sic] she suffered an injury as defined by the Act. They [sic] support the position with testimony from Dr. Jacob, orthopedic surgeon, who opines Ms. Davis had a lumbosacral strain now resolved and has sustained no harmful change to the human organism as a result of her work activities at Parkway Medical Center whether it be a reported event of May 15, 2010 [sic], or repetitive activity.

Dr. Jacob specifically noted when he saw her she had a completely normal physical examination including musculoligamentous and neurological and could forward flex and almost touch her toes with completely normal spinal range of motion without complaints of pain, tenderness, or spasm on repeated motion testing. She had a normal neurological examination and there was no areas of focal tenderness or positive findings. Dr. Jacob noted she was working full-time and was enrolled in school.

In this specific instance, after careful review of the lay and medical testimony, the Administrative Law Judge finds [sic] and [sic] relies on the opinions of Dr. Jacob, who is found to be persuasive and finds that the Plaintiff has not met her burden of proving that she suffered a lumbar injury as defined by the Act.

Dr. Jacobs [sic] examination revealed that Ms. Davis' back condition was normal in spite of the subjective complaints she testified to [sic] her Final Hearing. In addition, Ms. Davis has been able to continue working full-time at Walgreens, and to attend school full-time and was released to return to work as a CNA at Parkway Rehabilitation and Nursing Center without restrictions.

Therefore, the Administrative Law Judge finds Ms. Davis has not met her burden of proving she suffered an injury as defined by the Act and therefore her claim for Worker's Compensation benefits shall be dismissed in its entirety.

Significantly, Davis did not file a petition for reconsideration.

On appeal, Davis argues the overwhelming weight of the evidence establishes the ALJ erred in dismissing her claim "in its entirety." Davis cites to the evidence in the record which supports a decision in her favor and asserts there is "unanimity of medical opinion in that [she] sustained a lumbosacral strain." Although there may be differing opinions as to whether the injury had resolved or is permanent, Davis submits she "sustained at least a temporary injury." Therefore, Davis argues at a minimum, she should have been awarded temporary total disability ("TTD") benefits and medical benefits until such time she reaches maximum medical improvement ("MMI").

As the claimant in a workers' compensation proceeding, Davis had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Davis was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and

credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Furthermore, in the absence of a petition for reconsideration, 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 factual conclusions. In other words, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

In his June 11, 2011, IME report, Dr. Jacob concluded as follows:

> On the date of this examination, [Davis] was noted to have a completely normal physical examination including musculoligamentous and neurological. Of note, [Davis] can forward flex and almost touch her toes with completely normal spinal range of motion without

> complaints of pain, tenderness, or spasms on repeated motion testing. She had a normal neurological examination. There were no areas of focal tenderness or positive physical findings. She works full time and is enrolled in school.

Dr. Jacob noted Davis' MRI findings were "age and genetically determined findings." He diagnosed "lumbosacral strain now resolved." Dr. Jacob stated Davis did not sustain a "harmful change to the human organism as a result of her work activities at Parkway Medical Center whether it be a reported event of May 15, 2010 [sic], or any repetitive activity."[1] Dr. Jacob assessed no impairment. Dr. Jacob believes Davis is fully capable of returning to the job she was doing at the time of the May 14, 2010, injury, and no additional medical management or treatment is indicated.

Contrary to Davis' assertions, the opinions expressed by Dr. Jacob in his June 1, 2011, IME report constitutes substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939). While Davis

[1] Dr. Jacob incorrectly referred to the injury date as May 15, 2010. The correct date is May 14, 2010.

correctly asserts there is evidence in the record which could have been relied upon by the ALJ to support an outcome in her favor, that evidence, in light of the remaining record, represents nothing more that conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003). As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Consequently, we find no error in the ALJ's determination Davis was not entitled to an award of future income benefits and medical benefits.

Likewise, we find no merit in Davis' argument that she is entitled to an award of temporary total disability ("TTD") benefits. KRS 342.040 reads, in relevant part, as follows:

> (1) Except as provided in KRS 342.020, no income benefits shall be payable for the first seven (7) days of disability unless disability continues for a period of more than two (2) weeks, in which case income benefits shall be allowed from the first day of disability. All income benefits shall be payable on the regular payday of the employer, commencing with the first regular payday after seven (7) days after the injury or disability resulting from an occupational disease

> with interest at the rate of twelve percent (12%) per annum on each installment from the time it is due until paid, . . .

Even though Dr. Jacob diagnosed a resolved lumbosacral strain, we find nothing in the record establishing Davis' disability, as a result of the strain, continued for a period of more than two weeks. Concerning the time she missed work after her injury, during her deposition, Davis testified as follows:

> Q: What did he tell you about work?
>
> A: He told me to stay off of work for a week. Was it a week? It was either three days or a week from – because I had – I was still working at Walgreens, but I don't do the same work that I do at Walgreens that I do at Parkway.
>
> Q: Right.
>
> A: So, I think I was off from Walgreens maybe three days and from Parkway for a week.
>
> Q: What did you tell them at Walgreens as far as why you needed to be off?
>
> A: That's the – Saturday I also had called my supervisor and asked her what should I take, just to make sure I wasn't mixing any drugs together, and she said the same thing my mom said, take some Ibuprofen and put some heat on it, and then she told me to call her on Monday after they called me back from Parkway, because she needed to know if I was going to be able to work.

Q: Sure. Now, did you actually have to take off work, or did they sort of work that into the schedule at Walgreens?

A: No. They had to take off, because at that time I was working 9:00 to 5:00.

Q: Did you – other than those three days at Walgreens, did you miss any work from Walgreens because of your back injury?

A: Yes.

Q: Can you tell me, was it a time where a doctor took you off work again?

A: Yes.

Q: Tell me about that.

A: I had went [sic] back in to see him again.

Q: Dr. Markert?

A: Yes, Dr. Markert.

Q: Okay. All right. Go on.

A: And he had gave me instructions to stay off of my feet for another week, because it was about two weeks that I had to –

Q: Was this right after you got hurt?

A: No. This was another time, because my feet were swelling up, and the weight that’s on my back I couldn’t stand the pressure of standing up.

Q: Was this while you were still working at Parkway?

A: Yes. I was – I was off from Parkway too.

Q: How long did he take you off work at that point?

A: It was either three days or seven days. I can't remember, because I didn't keep an actual copy of the doctor's notes.

Q: So, that was a separate time that he took you off?

A: There was about three separate times that he took me totally off of work.

Q: Are you sure it was three or just two?

A: The one time I had to be off it was just like two days I had to be off when I got the injection in my back.

Q: Okay. Now, did Dr. Markert do the injection, or did he send you somewhere else?

A: No. He sent me to a pain management specialist.

Q: Okay. So, you were off – how many days were you off when you got the injection?

A: Just two.

Q: And that was from both jobs?

A: Yes.

Q: Have you kept a record of how many days total that you've missed from Walgreens?

A: No.

> Q: Was there ever a point where you were off for more than three days at a time from Walgreens?
>
> A: Yes.
>
> Q: Do you remember about when that was?
>
> A: Not off the top of my head. I would have to go back and look.

The above testimony does not establish Davis is entitled to TTD benefits. Davis' equivocal testimony indicates her disability never continued for a period of more than two weeks. While Davis testified she was off work on three different occasions, she did not provide the actual number of days she missed work due to the alleged work injury. There is no dispute Davis continued to work at Walgreens. At the hearing, Davis' testimony certainly did nothing to advance her claim for entitlement to TTD benefits. Regarding her missed work at Parkway and Walgreens, Davis testified at the hearing as follows:

> Q: Okay, now, let's come back over. You – you started missing work on May 15, 2010.
>
> A: Yes.
>
> Q: And you have continued to miss work for Parkway Rehabilitation Nursing Center?
>
> A: No, I'm no longer employed.
>
> Q: Okay, but you've never been able to return to work with them?

A: No.

Q: And but you have been able – and we're going to go over some of this, you have been able to return to work for Walgreens.

A: Yes.

Q: Okay, and you talked about you're no longer employed there, were you terminated?

A: Yes.

Q: Do you know why you were terminated?

A: No.

Q: Have you not been able to return to – to any type of work like that?

A: No.

Q: Is it because of your restrictions – your limitations?

A: Yes.

Q: What do you understand those to be?

A: I can't bend. I can't lift over twenty pounds without pain. It's painful to stand, twist, turn, to assist.

Q: Let me ask you this question, did – did you provide those type of restrictions to the Parkway Rehabilitation people?

A: Yes.

Q: Did they make any effort to try to accommodate your return to work?

A: No.

Q: Did they offer you, at any time, any light duty work?

A: Yes.

Q: And what happened?

A: When I was not able to perform the light duty work I was sat to the side, and then shortly thereafter terminated.

Q: Okay, now, you – let’s talk about this, you never returned to work for Parkway Rehabilitation and Nursing Center?

A: Not doing CNA duties.

Q: Not doing CNA duties.

A: No.

Q: You – how long did you work for them, briefly, before they terminated you, if you can recall?

A: I can’t recall if – I mean it was . . .

Q: Less than a week?

A: Yes.

Q: Now, when you worked for Walgreens did you have to miss work at Walgreens as a result of this injury?

A: Yes.

Q: And how much time did you miss from Walgreens?

A: Three to four weeks.

Davis' September 20, 2011, hearing testimony does not establish she missed more than fourteen days of work. Aside from the testimony recited herein, no evidence was introduced establishing the specific amount of time Davis was off work either at Parkway and/or Walgreens due to the work-related injury.

Significantly, in the November 18, 2011, opinion and order, the ALJ made the following findings of facts and conclusions of law: "Ms. Davis presented herself to Dr. Markert for treatment. He took her off work for a week and permitted her to return with restrictions." Later in the opinion and order, the ALJ stated as follows:

> However, Ms. Davis was able to continue working at Parkway Rehabilitation and Nursing Center without restrictions only missing a week of work from May of 2010 through November of 2010 when she was terminated. She was also able to continue working at Walgreens as a pharmacy tech, a job which requires her to be on her feet most of the time. In addition, she was attending school at ITT Tech study [sic] nursing.

Although those findings may have been erroneous, they were never challenged by Davis through a petition for reconsideration. Since Davis failed to file a petition for reconsideration, the above findings alone support the ALJ's determination Davis is not entitled to TTD benefits.

The ALJ found Davis missed only one week of work. Since her disability did not continue for a period of more than two weeks, she is not entitled to an award of TTD benefits. Stated another way, since Davis did not challenge the ALJ's finding through a petition for reconsideration, the failure to award TTD benefits must be affirmed.

In this case, our only task on appeal is to determine whether substantial evidence supports the ALJ's decision. Davis' testimony does not establish she missed work for the requisite period, thereby entitling her to an award of TTD benefits. Further, since the ALJ's finding that Davis only missed one week of work while working for Parkway and continued to work for Walgreens was not challenged by a petition for reconsideration, the ALJ's decision must stand. Because the decision of the ALJ is supported by substantial evidence, we are without authority to disturb the ALJ's decision on appeal. Special Fund v. Francis, supra.

Accordingly, the November 18, 2011, opinion and order of the Administrative Law Judge is **AFFIRMED**.

ALL CONCUR.

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