OPINION ENTERED: APRIL 5, 2013

CLAIM NO. 201193264

SCOTT COUNTY FISCAL COURT PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

KATHY CANNON
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Scott County Fiscal Court ("Scott County") appeals from the October 22, 2012 opinion and award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), awarding Kathy Cannon ("Cannon") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Scott

County also appeals from the November 20, 2012 order on reconsideration.

The sole question on appeal is whether the ALJ erred in enhancing Cannon's PPD benefits by the three multiplier. Because we find the ALJ's determination is supported by substantial evidence, we affirm.

Cannon testified by deposition on June 21, 2012, and at the hearing held August 24, 2012. Cannon is employed by Scott County as a deputy sheriff, where her duties include serving papers, transporting inmates, performing car inspections, and processing real estate property taxes.

Cannon stated she was injured on March 14, 2011 when she fell onto a concrete floor. She was taken to the Georgetown Community Hospital emergency room, and was off work from March 15, 2011 through April 24, 2011. She was then treated by Dr. Brett Oliver, who referred her to Dr. Harry Lockstadt, an orthopedic surgeon. Dr. Lockstadt placed her on light duty of no lifting more than twenty pounds and alternating between sitting and standing as needed. Cannon's employer accommodated her restrictions.

At her deposition, Cannon estimated she had missed ten days of work since her initial return. At the hearing, she stated she had missed five or six days in the previous three months due to the injury. She stated she is unable to

perform transport duties due to her inability to ride in a vehicle for extended periods of time. Cannon testified she continues to experience pain which impacts her activities of daily living. She stated her leg occasionally gives out, goes numb and interrupts her sleep at night, causing her to get up to walk, and sleep on the couch to avoid disturbing her husband.

Cannon testified she sustained a prior back injury in 2009 when she was thrown from a horse, for which Dr. Lockstadt performed back surgery. She missed approximately twenty days of work in 2009, then returned to her job as a deputy.

Dr. James Owen evaluated Cannon on April 6, 2012, for complaints of low back and left hip pain. Dr. Owen diagnosed persistent radiculopathy at the L2–4 levels with minimal radicular signs and marginal MRI confirmation. He stated Cannon's complaints were partly due to her previous compression fractures, brought into disabling reality by the March 2011 injury. Dr. Owen assessed a 12% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated Cannon had reached maximum medical improvement ("MMI") and retained the physical capacity to return to the type of work she performed at the time of her

injury. He restricted her to no lifting, handling, and carrying objects more than twenty pounds; no recurrent bending, squatting, or stooping; and no walking or standing for more than ten minutes.

Cannon submitted records from Bluegrass Orthopedics where she was initially seen on April 14, 2011 for complaints of low back pain radiating into the thigh, calf, and intermittently into the foot. Dr. Lockstadt reviewed her imaging studies and diagnosed an injury at L5–S1 with sciatic pain. He recommended medications, physical therapy, and an epidural injection. On July 14, 2011, Cannon indicated the epidural injection improved her pain and functioning. However, a second injection was not beneficial. Dr. Lockstadt recommended an MRI of the lumbar spine and an EMG study. On September 12, 2011, he diagnosed a femoral neuropathy. On January 23, 2012, Dr. Lockstadt noted an MRI revealed facet joint spondylosis, an old kyphoplasty and minimal bulging in the mid-lumbar level. The EMG study revealed abnormalities at L2–4. On February 20, 2012, Dr. Lockstadt stated, following her fall at work, her pre-existing asymptomatic facet joint spondylosis at L4–5 and L5–S1 became symptomatic. He diagnosed facet joint spondylosis at L4–5 and L5–S1; mild disc protrusion L3–4 on

the left side, and neuropathic pain as demonstrated on the abnormal EMG nerve conduction study on the left side.

In his report dated August 7, 2012, Dr. Thomas Loeb diagnosed left radicular pain at L4 secondary to a contusion and aggravation of her underlying dormant condition from previous fractures. Dr. Loeb recommended a CT myelogram, selective nerve root blocks and stronger anti-inflammatory medication. He stated Cannon had not reached MMI because of her ongoing symptomatology. Dr. Loeb indicated Cannon had a pre-existing impairment of 11% due to the previous lumbar fracture. Dr. Loeb assigned restrictions of no repetitive bending, stooping, lifting greater than twenty-five pounds, prolonged standing, climbing, or extensive walking. He attributed the restrictions, in part, to her previous injury, and apportioned 80% to the old injury and 20% the new injury.

Scott County submitted a job description indicating Cannon’s duties were sedentary. Her job was described as involving computer work, typing, filing, answering phones and customer interaction. Physical requirements included the ability to constantly sit, and occasionally stand, walk, lift and carry ten pounds, reach, bend/twist, use vibratory tools, handle, finger, grip, push/pull, squat, flex, kneel

and stoop. The form indicated no restricted duty program was available.

In the October 22, 2012 opinion and award, the ALJ found as follows relevant to this appeal:

> 17. The Plaintiff offered credible testimony regarding the difficulties that she has experienced during her return to the job. She stated that she has missed several days due to her injury and that she doubts that she will be able to maintain this employment indefinitely in the future.
>
> 18. The ALJ therefore determines the Plaintiff does not retain the ability to return to the type of work that she was performing at the time of the injury because it is unlikely that she will be able to sustain her current employment. She is thus entitled to the "three" multiplier pursuant to *Fawbush v. Gwinn* 103 SW3d 5 (Ky. 2003).

Both Cannon and Scott County filed petitions for reconsideration. Scott County's petition for reconsideration included the same arguments it now raises on appeal, as well as pointing to an error in the award of TTD benefits and PPD benefits.

The ALJ issued his order ruling on the petitions for reconsideration on November 20, 2012. The ALJ corrected the award regarding the period of TTD benefits and PPD benefits, but denied the remainder of Scott County's petition.

On appeal, Scott County argues the ALJ erroneously awarded the three multiplier pursuant to KRS 342.730(1)(c)1 because Cannon retained the physical capacity to perform the type of work she performed at the time of her injury. Scott County contends the sole basis for the ALJ's award of the three multiplier was the unlikelihood of her ability to sustain her current employment. Scott County contends Cannon's inability to assist in transports is insufficient to render her current employment a different type of employment. Scott County further contends Cannon is only entitled to benefits calculated pursuant to KRS 342.730(1)(b) and her remedy is to reopen her claim if she has a worsening of her condition to the extent she lacks the physical capacity to perform the type of work she performed at the time of her injury.

Cannon 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 that burden, the question on appeal is whether there exists substantial evidence in the record 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). 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).

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, 34 S.W.3d 48 (Ky. 2000). 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).

Upon consideration of the ALJ's analysis, we are satisfied he made adequate findings of facts and conclusions of law. Although the parties stipulated Cannon returned to work at the same wage she was earning at the time of her injury, the ALJ was convinced Cannon did not retain the physical capacity to return to the type of work she performed at the time of her injury, and he performed an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003).

Where both the three multiplier and the two multiplier potentially apply under the given facts of a claim, the principles enunciated in Fawbush v. Gwinn, supra, and progeny, require an ALJ to make three essential findings of fact. First, the ALJ must determine, based on substantial evidence, that a claimant cannot return to the "type of work" performed at the time of the injury in accordance with KRS 342.730(1)(c)1; second, the claimant has returned to

work at an average weekly wage equal to or greater than her pre-injury average weekly wage in accordance with KRS 342.730(1)(c)2; and, third, whether the claimant can continue to earn that level of wages into the indefinite future. Subsequent to Fawbush, the Supreme Court in Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003) instructed if the ALJ determined the claimant earned the same or greater wage as she had at the time of her injury,

> The ALJ must then apply the standard that was set forth in Fawbush v. Gwinn, *supra*, to determine from the evidence whether he is likely to be able to continue earning such a wage for the indefinite future and whether the application of paragraph (c)1 or 2 is more appropriate on the facts.

In this case, although the ALJ's findings were *de minimus*, he specifically found Cannon's testimony credible regarding the difficulties she experienced upon returning to work. She testified she was no longer able to perform the full range of duties which she had performed prior to the injury. She indicated she could no longer perform transport duties and has problems with leg numbness, and occasional loss of function. Cannon's testimony regarding her retained physical capacity is substantial evidence supporting the ALJ's application of the three multiplier.

It is well-settled the fact-finder may rely upon a claimant's own testimony as to capabilities and limitations in determining the physical capacity to return to work following an injury. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979); Ruby Construction Company v. Curling, 451 S.W.2d 610 (Ky. 1970). Contrary to Scott County's arguments, the evidence does not mandate a finding Cannon currently retains the physical capacity to perform the type of work she was performing at the time of her injury.

Given Cannon's restrictions, difficulties and ongoing complaints, the ALJ could reasonably conclude she was unlikely to continue to earn the same or greater wage for the indefinite future. There being substantial evidence to support the ALJ's conclusion, we may not reverse.

Accordingly, the October 22, 2012 Opinion and Award rendered by Hon Jonathan R. Weatherby, Administrative Law Judge, and the November 20, 2012 order on petitions for reconsideration are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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