OPINION ENTERED: April 26, 2013

CLAIM NO. 201200570

SEKRI[1] PETITIONER

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

DOROTHY HALL WOODARD
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. SEKRI seeks review of the October 16, 2012, opinion and order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding Dorothy Hall Woodard ("Woodard") totally occupationally disabled and awarding permanent total disability ("PTD") benefits and medical benefits. SEKRI also appeals from the November

[1] South East Kentucky Rehabilitation Industries ("SEKRI").

8, 2012, opinion and order overruling its petition for reconsideration.

On appeal, SEKRI challenges the ALJ's reliance upon the opinions of Dr. Robert C. Hoskins and asserts the ALJ "applied an incorrect evidentiary burden."

Woodard's Form 101 alleges an injury on March 13, 2011.[2] She described how the injury occurred as follows: "I flexed my hands repetitively while performing my job, rendering me unable to perform my job duties at the time." During the entire time she was employed by SEKRI, Woodard worked as a seamstress.

Woodard testified at a July 26, 2012, deposition and the September 27, 2012, hearing. She worked for SEKRI from 2003 until she was laid off in 2006. Woodard returned to work at SEKRI in 2007 and worked through 2011. She testified she developed a lot of problems in both hands and her neck as a result of working as a seamstress. During her employment, Woodard sewed coats, hats, pants, and elbow patches. She also put labels on shirts and when she was out of work, she trimmed shirts.

After she returned to work in 2007, Woodard testified she developed significant problems in both hands.

[2] Although Woodard alleged an injury, it is clear there are multiple injuries.

She experienced stiffness and pain in the left hand. The pain extended from the left hand to her shoulder. Woodard's primary problems are in her left thumb, index, and middle fingers. She is unable to completely close her left hand. She experiences burning and tingling in the thumb, index, and middle fingers of her right hand. She also experiences pain in her neck which extends into her right arm. As a result of her problems, SEKRI provided her with a chair with an armrest in order to relieve some of her pain.

Woodard believes the problems in her left hand started in 2009. At that time, her left hand cramped and "went stiff." Woodard was unable to provide the exact time she developed right hand problems because she had tolerated the pain since it was not as severe as the pain in her left hand.

Woodard acknowledged she had broken her arm in 2002 in a 4-wheeler accident from which she fully recovered. She was unable to recall a number of occasions between 2003 and 2007 when she was treated for pain primarily in her left arm.

Woodard testified she quit work because of personal problems at home and the pain she experienced at work. She acknowledged the primary reason she quit was due

to problems at home. She testified her hands do not hurt as often since she quit work. However, Woodard does not believe she can work again because of her pain which is still severe. She currently takes Neurontin, Tramadol, and Lortab for pain.

Woodard testified she developed all of her neck, arm, and hand problems in the course of sewing. While sewing she regularly moves her head from side to side and up and down. She explained she grabs the garment and pushes it under the needle. After sewing the garment, she then lays it aside. Stiff or thick fabric was very difficult to sew and caused more pain in her hands. All of the sewing she performed required the constant use of her fingers.

Although Woodard submitted various medical records, she relied primarily upon the Form 107 and addendum of Dr. Hoskins. Similarly, SEKRI relied primarily upon the independent medical examination ("IME") reports of Dr. Richard DuBou and Dr. Timothy Kriss.

The September 5, 2012, benefit review conference ("BRC") order reflects the parties identified the following contested issues: "causation, notice, pre-existing and active, extent and duration, application of multipliers."

In the October 16, 2012, opinion and order, concerning the issue of causation, the ALJ found as follows:

> KRS 342.0011(1) defines "injury" to mean 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. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.
>
> I saw and heard the plaintiff testify at the hearing. She was a credible and convincing witness. I also found persuasive the comprehensive Form 107 medical report from Dr. Hoskins, who stated that Ms. Woodard will sustain a significant permanent [sic] to the body as a whole as a result of her cumulative trauma work injuries while employed by the defendant.

The ALJ concluded there was "no credible or convincing evidence" establishing Woodard's symptoms prior to the work-related injuries on March 13, 2011, were significant and SEKRI had not proven the existence of a pre-existing active condition or occupational disability. Based on Dr. Hoskins' report and Woodard's testimony, the ALJ concluded as a result of her work injuries, Woodard sustained a significant permanent impairment and lacked the

capacity to return to work. Relying upon Dr. Hoskins' impairment rating, the ALJ found Woodard has a 32% impairment.

In finding Woodard is totally occupationally disabled, the ALJ stated as follows:

> In the present case, I considered the severity of the plaintiff's work injuries, her age, her work history, her testimony and Dr. Hoskins' specific opinions regarding her permanent impairment and occupational disability. Based on those factors, I make the factual determination that the plaintiff cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

SEKRI filed a petition for reconsideration taking issue with the finding Dr. Hoskins stated "that Ms. Woodard will sustain a significant permanent [sic] to the body as a whole as a result of her cumulative trauma work injuries while employed by [SEKRI]." It asserted the above phrase was incomplete and confusing and requested the ALJ to clarify "what was meant to be conveyed." SEKRI also asserted the ALJ did not address the issue of causation and applied an "incorrect evidentiary standard."

Relying upon Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), SEKRI maintained, as it does on appeal, the ALJ erred in relying upon Dr. Hoskins' opinion

since Dr. Hoskins did not review any portions of Woodard's medical history prior to 2009. Thus, Dr. Hoskins' opinions were "substantially inaccurate" and deficient. SEKRI also argued the testimony establishes Woodard was an "incompetent medical historian," therefore her testimony is not substantial evidence supporting the ALJ's determination of permanent total disability. SEKRI requested the ALJ set aside his opinion and order and either refer Woodard for a university evaluation pursuant to KRS 342.315 or enter an opinion in conformity with the opinions of either Dr. Kriss or Dr. DuBou, the only credible medical evidence of record.

In the November 8, 2012, opinion and order ruling on the petition for reconsideration, the ALJ acknowledged a clerical error on page six of the opinion and order and amended the sentence in the opinion and order to read as follows:

> I also found persuasive the comprehensive Form 107 medical report from Dr. Hoskins, who stated that Ms. Woodard will sustain a significant permanent <u>impairment</u> to the body as a whole as a result of her cumulative trauma work injuries while employed by the defendant.

The ALJ overruled the remainder of SEKRI's position finding the opinion and order as amended addresses all contested issues raised by the parties in the BRC order.

On appeal, SEKRI argues the ALJ erred in relying upon Dr. Hoskins' report. It argues the ALJ "failed to accurately characterize the nature of Dr. Hoskins' impairment rating" since 11% of the 32% rating was attributable to Woodard's lumbar spine condition. SEKRI asserts the ALJ failed to recognize Dr. Hoskins "ascribed a work-related impairment to body parts which were not even the subject of litigation." SEKRI cites to Woodard's representation during her deposition that her back problems did not constitute a part of the claim. Similarly, SEKRI asserts the ALJ failed to reference Woodard's disavowal of this fact. Therefore, the ALJ's reliance upon Dr. Hoskins' medical opinion is erroneous as a matter of law.

SEKRI also maintains Dr. Hoskins' Form 107 clearly reflects Dr. Hoskins "failed to consider any aspect of [Woodard's] medical or accident treatment history prior to the calendar year 2009." Citing Cepero, supra, SEKRI argues since Dr. Hoskins failed to review or consider Woodard's history of multiple non-work-related injuries to her head, neck, and bilateral upper extremities, his

opinions regarding "causation and the work-related impairment are unsupportable."

Next, after citing the ALJ's finding it had not proven the existence of a pre-existing active condition or occupational disability, SEKRI posits as follows:

> When this section is read within the context of Judge Rudloff's overall opinion, it appears that he disqualified the Petitioner's arguments as to causation based on its failure to produce evidence of a pre-existing, symptomatic, and ratable physical condition which was congruent with Respondent's alleged work injuries. While the Petitioner questions whether any such evidence would have been properly considered by this particular Administrative Law Judge, his insistence that the Petitioner prove a pre-existing disability condition is an integral part of its overall case is erroneous.
>
> For purposes of maintaining judicial clarity, the Petitioner would ask the Workers' Compensation Board to reassert the longstanding precedent that a claimant bears the risk of non-persuasion and that Kentucky law requires an individual to prove every essential element of his/her claim. [citations omitted]

SEKRI contends it did not attempt to establish the existence of a pre-existing ratable impairment nor did it seek a carve out for a pre-existing active condition. Rather, it argued there was no causal relationship between

Woodard's work activities and her injuries. SEKRI concludes by stating as follows:

> To the extent that his suppositions erroneously conflate the applicable burden of proof within the context of a Kentucky workers' compensation case, the Petitioner respectfully requests that the Workers' Compensation Board re-affirm established precedent and strike those portions of Judge Rudloff's opinion which address a non-justiciable issue.

Woodard, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including causation and the extent of her occupational disability. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Woodard was successful in that burden, the question on appeal is whether there was substantial evidence of 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). An 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). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). 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). 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).

We find no merit in SEKRI's assertion the ALJ erred in relying upon Dr. Hoskins' opinions and impairment rating. In his Form 107, Dr. Hoskins stated Woodard's injury within reasonable medical probability was the cause of her complaints. In explaining the causal relationship, he stated the repetitive work Woodard performed over the years was the cause of her impairments. Accordingly, Dr. Hoskins assessed a 32% impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") and stated Woodard had no active impairment prior to the injury. Dr. Hoskins referenced the attached Form 107-I addendum for an explanation of the assessed impairment. In the Form 107-I addendum, Dr. Hoskins states as follows:

> Ms. Woodard's injury occurred well over one year ago. I did not have medical records relative to the patient's low

> back pain. By history, she had low back pain and had a confirmed radiculopathy. If this history were accurate, she would qualify for DRE Lumbar Category 3 impairment with a 10-13% rating. This was not included in the patient's permanent impairment rating today.
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> . . .
>
> As noted above, I did not give a formal rating for the lumbar spine due to lack of records. In addition, I am not certain that the patient is alleging that her low back complaints are related to her work responsibilities.

Dr. Hoskins' 32% impairment rating attributable to the work injury is composed of a 10-13% whole person impairment for the cervical spine, a 12% whole person impairment for the right upper extremity, and a 14% whole person impairment for the left upper extremity. Utilizing the combined values chart, Dr. Hoskins stated as follows:

> Combining Ms. Woodard's right upper extremity regional impairment 12% whole person with her left upper extremity regional impairment of 14% whole person yields 24% whole person impairment (Combined Values Chart, page 604). Combining the 24% whole person impairment derived above with her cervical spine regional impairment of 11% whole person yields 32% whole person impairment (Combined Values Chart, page 604).

Dr. Hoskins' Form 107-I addendum states his impairment rating of 32% did not include any impairment for the lumbar spine. Twice in the addendum, Dr. Hoskins expressly stated

the 32% impairment rating did not include an impairment for the lumbar spine.

In summarizing Dr. Hoskins' records, the ALJ stated Dr. Hoskins assessed a 32% impairment due to Woodard's "neck and upper extremity injuries." Clearly, the ALJ understood Dr. Hoskins was not assessing an impairment for the lumbar spine. That said, SEKRI did not raise this issue in its petition for reconsideration. Thus, SEKRI waived any right it had to argue on appeal that a portion of Dr. Hoskins' impairment rating included an impairment rating to a body part which was not injured as a result of the alleged work injury of March 13, 2011.

Likewise, we find no merit in SEKRI's assertion Dr. Hoskins' report reflects he failed to consider "any aspect of Woodard's medical treatment prior to 2009." On the second page of his Form 107 under the heading "Past Medical History," Dr. Hoskins stated as follows:

> She had a fracture of the left ulna in 2002, she sprained her left arm in 2004, contused her left arm in 2005. She reported that the left arm hurt off and on for about a year in 2006 and 2007.

Although Dr. Hoskins stated he reviewed the medical records of Clover Fork Clinic, Appalachian Regional Healthcare, Inc., Dr. James R. Bean, and Dr. Jose M. Echeverria, none

of which pre-dated January 30, 2009, it is obvious he was well aware of Woodard's pre-2009 left arm injuries and problems. He specifically referenced injuries and symptoms Woodard experienced in five different years prior to 2009. Similarly, in discussing whether Woodard had a prior active impairment, Dr. Hoskins stated as follows: "The previous injuries in the left arm may account for some of the left arm and wrist pain and contribute to her decreased grip strength." In the addendum attached to the Form 107, Dr. Hoskins stated as follows:

> I did not include the strength component of the median nerve for impairment. The reason is that the median nerve is a small contribution of strength to the grip. Her left grip is much weaker than the right and she had previous injuries to the left hand that likely commingles with the strength loss from the median nerve damage.

Dr. Hoskins' Form 107 and the Form 107-I addendum firmly establish he was well aware of Woodard's multiple left arm problems pre-dating 2009 and he had a clear understanding of Woodard's left arm problems which began with a 2002 fracture of the ulna.

Assuming, *arguendo*, Dr. Hoskins did not review certain medical records prior to 2009, that fact does not render his opinion less than substantial. Rather, his failure to consider any previous symptoms and/or treatment

goes to the weight to be assigned to his opinion and testimony which is a question solely to be decided by the ALJ in his role as fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Here, relying upon a physician's opinions and Woodard's testimony, the ALJ determined Woodard sustained a work injury which caused her to be totally occupationally disabled which is purely within the ALJ's discretion.

We also conclude Cepero, supra, is inapplicable in the case *sub judice*. Cepero, supra, was an unusual case involving not only a complete failure to disclose, but affirmative efforts by the employee to cover up a significant injury to the left knee only two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury had left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied in awarding benefits was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. We find nothing akin to Cepero in the case *sub judice*.

SEKRI's argument regarding the ALJ application of the "incorrect evidentiary burden" is hard to follow. SEKRI's assertion it made no effort to establish a pre-existing ratable impairment or a carve out is perplexing as it listed "pre-existing active" as a contested issue in the September 5, 2012, BRC order. Thus, we believe the ALJ was required to address that issue in his opinion. The ALJ did not confuse the issues of causation and the existence of a pre-existing active disability. Based upon Woodard's testimony and Dr. Hoskins' Form 107, the ALJ determined that as a result of her cumulative trauma work injuries and while in the employ of SEKRI, Woodard had a 32% impairment and was totally occupationally disabled. The ALJ correctly determined pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), SEKRI had the burden of proving the existence of a pre-existing active condition. Thereafter he determined there was no evidence Woodard had a pre-existing active condition or occupational disability. This determination is in accordance with the BRC order which identified "pre-existing and active" as one of the contested issues. Therefore, the ALJ did not resolve the issue of causation by applying an incorrect standard nor did he err in determining there was no pre-existing active condition and occupational disability.

Accordingly, the October 16, 2012, opinion and order and the November 8, 2012, opinion and order on reconsideration rendered by the ALJ are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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