OPINION ENTERED: November 30, 2012

CLAIM NO. 201168107

SHERRY COFFEY PETITIONER

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

SISTER SCHUBERT'S
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Sherry Coffey ("Coffey"), *pro se*, seeks review of the opinion rendered July 27, 2012, by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), dismissing her claim against Sister Schubert's. No petition for reconsideration was filed.

On appeal, we interpret Coffey's brief as arguing the ALJ's decision is not supported by substantial evidence, and compels a finding in her favor. We disagree and affirm.

Coffey filed a Form 101 on December 14, 2011, alleging injuries to her neck, back and both upper extremities due to continuous lifting, and use of her hands and arms. Coffey testified by deposition on February 14, 2012, and at the hearing held May 31, 2012.

Coffey was born on April 13, 1968, and is a resident of Glasgow, Kentucky. She obtained a GED in 2008. At her deposition, Coffey advised she had undergone surgery for carpal tunnel syndrome while working for a previous employer. She denied any prior cervical or lumbar problems, but stated she had treated with a chiropractor in the past because she "hurt all over". She also stated she was treating with Dr. Dennis O'Keefe, a neurologist, prior to October 10, 2011 for anxiety, depression and migraine headaches for which she was prescribed Fluoxetine, Diazepam and Hydrocodone. She takes no medication for her alleged work-related injury other than over the counter Ibuprofen.

Coffey's work history includes working as a cashier/stocker at a convenience store, sewing machine operator, group leader, assembly line work, and lead on a

production line. She also worked briefly as a substitute teacher. She began working for Sister Schubert's in 2009. Her first job there was as a line technician inspecting rolls. Her next job there entailed placing rolls into pans. Approximately four months prior to October 10, 2011, she moved to a pan return position requiring her to return empty pans weighing twenty-two to twenty-four pounds to the production line.

On October 10, 2011, Coffey complained to her supervisor the job duties had caused her to develop pain in her neck, back, shoulders and both arms. She stated she had no specific accident or injury, but she experienced a gradual onset of symptoms over a few months. She initially sought treatment with Dr. Ian Gilson, a family practitioner, who placed her on light duty, and ordered physical therapy which she stated did not alleviate her complaints. No surgery has been performed, nor has any been recommended for her alleged work-related conditions. Likewise, Coffey missed no work due to her alleged injuries. She continued to work in a light duty position with Sister Schubert's until she underwent surgery for unrelated conditions. After recuperation from her surgery, she returned to the light duty position at Sister Schubert's until April 2012 when her restrictions were no

longer accommodated.

At the hearing, Coffey testified Dr. Loeb was untruthful in his report. She stated he spent very little time with her and administered little, if any, testing. She also stated the production manager and safety director were untruthful in their testimony. Finally, Coffey disagreed with the testimony of Dr. James Crews, her family physician, who testified he had treated her in the past for low back pain.

In support of the Form 101, Coffey filed the report of a cervical MRI performed on November 28, 2011. The MRI report noted a small central disk protrusion at C5-C6 and a subtle paracentral disc protrusion at C6-C7 with a straightening of the cervical lordosis due to muscle spasm.

Coffey also filed the April 5, 2012 report of Dr. Walter Warren who performed an evaluation at her request. Dr. Warren noted a history of pain in both arms, shoulders, neck, low back and both legs beginning in July 2011. Dr. Warren diagnosed Coffey with left bicep tenosynovitis, L4 or L5 radiculopathy, and cervical pain with left radicular complaints, all of which he opined were caused by the repetitive nature of her work. Dr. Warren assessed an 8% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent

Impairment, 5th Edition ("AMA Guides"). Dr. Warren further recommended Coffey be limited to right-handed duty only, with no repetitive activities to the left upper extremity.

On March 27, 2012, Coffey was evaluated by Dr. Thomas Loeb, an orthopedic surgeon. Dr. Loeb noted Coffey was a poor historian, and was unable to relate any dates of onset, or injury to her neck, shoulders or low back other than sometime in 2011. She advised her job as a pan returner required repetitive lifting of pans weighing twenty-four pounds. Dr. Loeb further noted she denied any previous problems with her neck or back, which he stated was contradicted by the medical records.

Dr. Loeb stated Coffey demonstrated marked symptom magnification and inappropriate complaints on physical examination. He noted she demonstrated multiple positive Waddell's signs. Dr. Loeb diagnosed pre-existing degenerative changes in the cervical and lumbar spines, which he determined were not causally related to her work and her complaints. He further stated she did not qualify for an impairment rating pursuant to the AMA Guides, and he would impose no restrictions.

Dr. James Crews, Coffey's family physician, testified by deposition on March 29, 2012. Dr. Crews first saw Coffey on November 12, 1998. On March 12, 2001, Coffey

complained of low back pain extending into both lower extremities for which he referred her to Dr. Reddy, an orthopedic surgeon. On December 1, 2003, he again saw Coffey for complaints of low back and leg pain, for which he prescribed anti-inflammatories, pain medication, and muscle relaxers. Dr. Crews saw her for complaints of hand pain on March 12, 2005, and he diagnosed bilateral carpal tunnel syndrome. On May 5, 2005, he treated her for right arm pain. He eventually referred her for treatment with Dr. Keith Morrison, an orthopedic surgeon in Bowling Green, Kentucky for that condition. He again saw Coffey on March 25, 2006 for complaints of back and leg pain. Dr. Crews treated her in 2007 for migraine headaches. On October 30, 2009, he treated Coffey for complaints of neck and low back pain subsequent to a motor vehicle accident. At no time did Coffey advise him of a work-related injury while she was working for Sister Schubert's. A CT scan dated October 27, 2009 revealed straightening of the neck and minimal disc space narrowing at C4-C5, C5-C6, and C6-C7.

Paula Crain, the production manager for Sister Schubert's, testified by deposition on April 13, 2012. Ms. Crain testified regarding her job as follows:

> My duties are to make sure production goes down, whatever is scheduled, to deal with people issues, attendance,

> scheduling, training, just about over everything that's out on the production floor.

She noted Coffey began working there in June 2009 as a line technician, and then was moved to working as a panner, where she placed rolls into pans. She noted employees could sit or stand while performing that job. Coffey then bid onto the pan return job which requires returning pans to the production line. She noted the pan return job was less repetitive than working as a panner, except when the line shut down. She noted the line had only shut down two to three times since she began working there in May 2007. She stated Coffey once complained pans were stacked too high, so a marker was placed indicating the maximum height pans could be stacked. She further stated Coffey first complained of her multiple symptoms in October 2011, and she had been placed on light duty since that time.

Frank Vasquez, the safety manager with Sister Schubert's, testified by deposition on April 3, 2012. His job requires him to investigate accidents and provide safety training. He stated Coffey began working for Sister Schubert's in June 2009. She moved to pan return on May 11, 2009. The pan return job required her to place pans weighing twenty-three and a half pounds apiece on a conveyor, one pan at a time. She was also required to

sweep and clean her work area. He stated her restrictions had been accommodated and she continued to work there.

A benefit review conference ("BRC") was held on May 16, 2012. At that time, the contested issues preserved for determination were benefits per KRS 342.730; work-relatedness/causation; average weekly wage; unpaid or uncontested medical expenses; injury as defined by the Kentucky Worker's Compensation Act; exclusion for pre-existing disability/impairment; temporary total disability. These issues were confirmed at the hearing held May 31, 2012.

In dismissing her claim, the ALJ found 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 lumbar spine, cervical spine, and left arm condition are causally related to cumulative trauma that she sustained while working for Sister Schubert's which manifested on October 11, 2011.
>
> 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 SW 2d 276 (KY App. 1979) *Jones vs. Newberg*, 890 SW 2d 284 (KY 1994).

In addition, a diagnosis is not itself an objective medical finding but, rather, a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. *Gibbs v Premier Scale Company/Indiana Scale Company*, 50 SW 3d 754 (KY 2001). Ms. Coffey has alleged that as a result of stacking and unstacking 23.5 pound trays repetitively that she suffered injuries to her cervical spine, lumbar spine, and her left upper extremity. She testified that she suffers from terrible pain in all three body parts as a result of her injuries and that she does not have the ability to return to work for the Defendant Employer performing her prior job. Ms. Coffey supports her position with the medical testimony of Dr. Warren who opines she has left bicep tenosynovitis, by MRI scan, left L4 or L5 radiculopathy by MRI scan and cervical pain with left radicular complaints that he believes is due to her repetitive overhead work and for which he assesses her an 8% functional impairment rating.

The Defendant Employer argues that Ms. Coffey has not met her burden of proving she suffered an injury as defined by the Act to any of the aforementioned body parts. They support their position with medical testimony from Dr. Loeb who opined that he could find no objective findings to substantiate her subjective complaints of pain in any of the body parts concerned. Dr. Loeb stated there was no relationship of any of her complaints with the work at the Defendant Employer and that she did not retain a

functional impairment rating pursuant to the Fifth Edition of the AMA Guides. Dr. Loeb felt her physical examination evidenced totally inappropriate responses to the physical testing in all four extremities including compensation to the neck and low back. Dr. Loeb found evidence of Waddell signs on testing and felt that she was markedly magnifying her symptoms.

In addition, the Defendant Employer submitted medical proof from Dr. Crews that reflected that he had treated her prior to her alleged injury for cervical and lumbar complaints that the Plaintiff denied. In addition, the Plaintiff testified Dr. Loeb barely touched her and did not perform any of the testing that his report sets forth. The Administrative Law Judge did not find Ms. Coffey to be a credible witness.

In this specific instance, the Administrative Law Judge finds persuasive the opinions of Dr. Loeb and finds that Ms. Coffey has not met her burden of proving that she suffered an injury to her cervical spine, lumbar spine, or left arm, as alleged by her resulting from cumulative trauma incurred while working for Sister Schubert's. The Administrative Law Judge had the opportunity to observe Ms. Coffey at the Final Hearing held herein and finds Dr. Loeb's testimony persuasive and feels that she is markedly magnifying her symptoms and that her subjective complaints are not substantiated by objective medical findings. Therefore her claim for Worker’s Compensation benefits arising out of an incident occurring and/or manifesting on October 10, 2011, shall be dismissed.

> Due to the foregoing findings the remaining issues herein are deemed moot.

It is well established a claimant in a workers' compensation claim bears the burden of proof and risk of non-persuasion before the ALJ, as fact-finder, with regard to each of the essential elements of her cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where the claimant is unsuccessful with regard to that burden, the question on appeal is whether the evidence compels 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. In

rendering a decision, KRS 342.275 and KRS 342.285 grant the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. 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).

Dr. Loeb's report constitutes substantial evidence which the ALJ could and did rely upon. We find

nothing improper in his reliance on Dr. Loeb's findings. Choosing to rely upon Dr. Loeb's findings rather than those of Dr. Warren does not constitute an unwarranted, arbitrary, capricious abuse of discretion.

In this instance, the ALJ specifically outlined the evidence he found to be most reliable, and sufficiently explained the basis for his conclusions. It therefore cannot be said the evidence compels a different result. Special Fund v. Francis, supra.

Accordingly, the decision on remand rendered July 27, 2012, by Hon. R. Scott Borders, Administrative Law Judge, is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

SHERRY COFFEY
292 GLOVER HILLS LANE
GLASGOW, KY 42141

COUNSEL FOR RESPONDENT:

HON RODNEY MAYER
600 E MAIN ST, STE 100
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042