

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 8, 2021

CLAIM NO. 200490045

KENTUCKY CARDIOLOGY, PSC

PETITIONER

VS. APPEAL FROM HON. JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

AMY ELMORE AND
JOHN H. MCCRACKEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Kentucky Cardiology, PSC (“Kentucky Cardiology”) seeks review of a decision rendered August 7, 2020 by Hon. John M. McCracken, Administrative Law Judge (“ALJ”). The ALJ dismissed Kentucky Cardiology’s attempt to reduce the award of permanent total disability (“PTD”) benefits granted to Amy Elmore (“Elmore”) in a decision rendered by Hon. Robert L. Swisher (“ALJ

Swisher”) on May 21, 2012. Kentucky Cardiology also appeals from the September 8, 2020 Order denying its Petition for Reconsideration.

On appeal, Kentucky Cardiology argues the ALJ erred in finding Elmore had not returned to work as defined by the Kentucky Workers’ Compensation Act. It also argues the ALJ erred in finding it had the burden of establishing her return to work. We find the ALJ properly exercised his discretion in finding Kentucky Cardiology failed to prove Elmore has returned to work, and therefore, we affirm.

Elmore sustained a work-related low back injury on March 28, 2004, while working as a nuclear technologist when she prevented a patient from falling off an imaging table. Elmore subsequently underwent numerous treatment modalities including injections and surgeries. She also took medications, including Fentanyl, for a number of years. ALJ Swisher took into consideration the medical evidence of record, including Elmore’s history of a previous lumbar fusion, in determining she was permanently totally disabled due to the work injury. Kentucky Cardiology appealed ALJ Swisher’s decision to this Board. On September 28, 2012, this Board affirmed ALJ Swisher’s decision, finding he performed the appropriate analysis, and the evidence supported his decision.

On September 16, 2019, Kentucky Cardiology filed a Motion to Reopen alleging Elmore had returned to work, and is no longer totally disabled. It sought to reduce the benefits awarded by ALJ Swisher. Kentucky Cardiology attached a copy of the July 3, 2019 Articles of Organization for Shear Zen Wellness Salon, LLC, listing Elmore as an organizer. It also attached the report of a private

investigator who alleged he interacted with Elmore at the salon office, and observed her entering the salon on a couple of occasions. It also provided Facebook postings purportedly identifying Elmore as a distributor for CBD products. On October 22, 2019, Hon. Douglas W. Gott, Chief Administrative Law Judge, entered an Order indicating Kentucky Cardiology had established a *prima facie* case for reopening the claim. On November 16, 2019, Elmore filed a Response asserting she has no ownership interest in the salon, owned by her friend, Bobbie Mann (“Mann”), nor is she employed there.

Elmore testified by deposition on March 25, 2020, and at the Hearing held June 26, 2020. Elmore testified she has not returned to work since her March 23, 2004 injury. She receives \$579.69 per week for her work-related PTD, and has no other source of income. She resides with her husband, who is employed and has his own income. Elmore testified she experiences constant pain in her low back, legs, and buttocks limiting her activities. She cannot sit or stand for long periods. She drives locally, but only goes to the grocery once per week. She stated she wears a back brace when she goes out, and occasionally at home. She replaces the back brace annually.

Elmore visits with Mann at the salon once or twice per month. Elmore loaned Mann \$5,500.00 to start the salon. Mann pays \$100.00 per month on the credit card Elmore used to finance the salon to satisfy the debt. Elmore testified the Articles of Organization improperly listed her as the organizer. She testified the entity was subsequently dissolved by a separate document retroactive to July 3, 2019, the date of the original filing. Elmore testified she files tax returns jointly with her

husband to receive tax credits, but she has no income other than her workers' compensation benefits. She also testified she received no W-2s or 1099s for either 2018 or 2019.

Elmore testified she no longer takes narcotic pain medication, opting instead to treat with CBD products. She occasionally answers questions from salon customers regarding the use of those products, but she is not an employee. She previously used a spinal cord stimulator, but that has been removed. She currently treats with Dr. Joseph Morris, her family physician, who prescribes anti-depressant and anti-anxiety medications. Elmore testified her ability to perform any work has not improved since ALJ Swisher's decision.

Kentucky Cardiology submitted Dr. Timothy Kriss' November 22, 2019 report. Dr. Kriss had previously evaluated Elmore at Kentucky Cardiology's request prior to ALJ Swisher's decision. Dr. Kriss stated Elmore exhibited exaggerated, diffuse thoracolumbar tenderness and pain. He opined she is physically better now than when he was in May 2012. He found she has no nerve root compression. He stated she should be more physically active. Dr. Kriss recommended Elmore return to work to a sedentary or light job. He found the 28% impairment rating he previously assessed pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, remains unchanged.

On May 17, 2020, Kentucky Cardiology filed a Request for Production of Documents requesting Elmore to provide copies of any W-2s, 1099s, and tax returns for 2018 and 2019. Elmore responded that she had no W-2s or 1099s since

she had not worked since her work injury. She did not mention the tax returns, and Kentucky Cardiology made no additional attempt to compel Elmore's compliance.

A Benefit Review Conference ("BRC") was held on June 17, 2020. The BRC Order and Memorandum reflects the contested issues included permanent income benefits, ability to return to work, and change in disability per KRS 342.730.

In his decision rendered August 7, 2020, the ALJ found *verbatim* as follows:

The ALJ has reviewed all of the evidence submitted by the parties and considered it in the context of Defendant having the burden to prove its claims that Elmore returned to work and is no longer permanently totally disabled as found in the May 21, 2012 Opinion, Award and Order. Standard Acci. Ins. Co. v. Hinson, 64 S.W.2d 574 (Ky. 1933); Jude v. Cabbage, 251 S.W.2d 584 (Ky. 1952).

Return to work. KRS 342.125 allows a party to file a motion to reopen when a change of disability is shown by objective evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award. KRS 342.125(1)(d). A motion to reopen must be filed within four years following the date of the original award or original order granting or denying benefits, when such award or order becomes final and non-appealable. KRS 342.125(3). The statute provides an exception to the four-year filing limitation when an employee "returns to work". KRS 342.125(3). In its brief, Defendant acknowledges that an award may be reopened when the employee returns to work. KRS 342.0011(34) defines "work" to mean "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy". KRS 342.0011(34). See also, Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), for context in consideration of a permanent total disability award.

Defendant asserts that Elmore returned to work when she listed herself as the owner of Ky. Zen Hemp and co-owner of Shear Zen Wellness Salon. Defendant asserts

that she wore what appeared to be a business uniform, spoke with their investigator and produced a business card. Defendant produced filings with the Secretary of State revealing that she was an organizer of Shear Zen Wellness Salon, LLC. Defendant states that Elmore's Facebook video describing the benefits of CBD oil demonstrate that she is working.

The ALJ reviewed the surveillance video and the video where Elmore discusses the benefits of CBD oil, selling CBD oil and being co-owner of the Wellness business. She tells her story in that video of her progress through medications and surgery for her work injury, and while she states the CBD oil helped, she does not state that she has recovered completely.

The surveillance video shows Elmore at the store wearing what appears to be a uniform answering questions from the investigator. The video did not contain audio. Elmore points out that from the many hours of video taken by the investigator, he only captures four hours and forty-five minutes of her away from home. She states that there were 32 hours of surveillance video. The ALJ reviewed the only two discs containing video and they are the video of Elmore promoting CBD oil stating she is selling the product and the surveillance video that is approximately 31 minutes long. That video primarily consists of video of Elmore from August 8, 2019 and August 9, 2019.

The surveillance video shows Elmore wearing a t-shirt with a logo on it that is similar to the video she produced. Elmore is seen driving a white SUV, carrying items (weight unknown) into the Wellness store with no apparent difficulty. Inside the store is a counter separating customers from workers. There is a sign hung on the wall behind the counter advertising CBD oil for sale. The ALJ saw several different items listed as CBD, or hemp, products on the board. The ALJ believes the video reveals that the store where Elmore appears to be discussing CBD products is a commercial business. However, there is no audio on the disc the ALJ reviewed.

The ALJ reviewed the secretary of state filings including the Articles of Organization of Shear Zen Wellness

Salon, LLC. These Articles of Organization list Elmore as the organizer of the company. In the video, she stated that she started the business with her friend and then testified that she was mistakenly listed as the organizer by the tax preparer. Elmore testified in her deposition that she did not own the business, or any business, and simply lent her friend money to start Shear Zen Wellness Salon. She stated that she did not take any profits from the business and that her friend paid \$100 per month on the credit card she used to make the loan.

The ALJ views surveillance as a snapshot in time of the activities of an individual. In this claim, it shows Elmore going into a commercial business, with her wearing a t-shirt containing a logo similar to the one on her video where she states that she is in the business of selling hemp/CBD products. However, there is no proof in the record of her having any wages from the business, no profits, nor anything else that she took in the form of wages or income from the business. Elmore stated that she only goes to the Shear Zen Wellness a few times a month. There is no evidence to dispute that other than the surveillance footage and transcript filed of record. The ALJ does not interpret that video to dispute Elmore's testimony regarding the frequency of her leaving her home or going to Shear Zen Wellness Salon.

Elmore asserts the surveillance only captured her away from her home for just over four hours out of 32 hours of surveillance. The ALJ reviewed the transcript and it primarily shows surveillance of Elmore on August 8 and August 9, 2019.

After reviewing the evidence, the ALJ believes that while Defendant may have made a prima facie case to reopen based upon the allegation that Elmore returned to work, they have not proven that element in the case in chief. While the Articles of Incorporation and video of Elmore do initially cause concern about whether she had returned to work, when viewed against her testimony, the ALJ does not believe that she has in fact returned to work. There is an absence of proof that she was at the store more than the two days of surveillance or the three to four days a month about which she testified.

The statutory definition of “work” requires proof that she is earning some type of income, or monetary benefit, on a sustained basis in a competitive economy. The ALJ finds no proof of her earning any wage, or that she was paid for her time at Shear Zen Wellness Salon. The ALJ understands that Defendant requested this information in a document request. While Elmore stated in the video that she was a co-owner of the Wellness Salon and owner of the CBD business as an affiliate, there is insufficient proof that she performed work for either of these ventures on a sustained basis from which she was paid. Her testimony that her name was placed as an organizer on the Articles of Incorporation was a mistake by her husband’s account is not rebutted.

The ALJ relies on Elmore to find that Defendant has not met its burden to prove that she returned to work, as defined by statute. ALJ Swisher filed the original Opinion, Award and Order on May 21, 2012. Absent an applicable exception, Defendant was required to file a motion to reopen based upon a change in disability within the four years following May 21, 2012. Because Defendant has not met its burden to prove Elmore returned to work, the motion to reopen based upon a change in disability is not timely and is therefore dismissed pursuant to KRS 342.125(3).

Kentucky Cardiology filed a Petition for Reconsideration arguing the ALJ failed to provide essential findings of fact and conclusions of law. It specifically argued as follows:

Per KRS 342.125(3), the petitioner/employer must show that the respondent/employee is engaging in services to another in return for remuneration of a regular and sustained basis in a competitive economy in order to show a return to work. The ALJ incorrectly places a burden on the petitioner/employer to submit evidence of wages, which is outside of the petitioner/employer’s control.

In his September 8, 2020 Order denying the Petition for Reconsideration, the ALJ stated as follows:

Defendant filed a Petition for Reconsideration requesting findings of fact. Defendant first requests findings of fact as to what evidence, outside of Plaintiff's testimony and contradicted testimony, document that the filings with the Secretary of State listing her as the sole organizer and Plaintiff's social media were made in error and been rescinded. The ALJ stated in the Opinion and Order that he relied upon Plaintiff's testimony and that she lent money to her friend to start the business. Additionally, Plaintiff testified that her husband's accountant accidentally placed her as the sole incorporator on the articles of incorporation, not Plaintiff. The ALJ notes that being the incorporator of an LLC or corporation does not necessarily mean that the business is owned or operated by the incorporator. The ALJ set forth his full reasoning in the Opinion and Order.

Defendant's second request for additional facts seeks to know what evidence was relied upon to reject the uncontradicted investigative report that documents the plaintiff's weekly working habits. The ALJ discussed in the Opinion and Order that he viewed the investigative report as a snapshot in time. There were no wage or earnings filed of record. The ALJ did not see evidence of "weekly" working habits. The ALJ specifically found that Defendant did not have enough evidence to demonstrate that she had returned to work. The ALJ also found that the motion to reopen based upon a change in disability was not filed within the prescribed four year statute. KRS 342.125(3).

The last request for a finding of fact seeks to have the ALJ explain why he found Plaintiff's testimony regarding her inability to work to be truthful when posting made by the Plaintiff, surveillance video, business records, and governmental records directly contradict her testimony. The ALJ set forth his rationale in the Opinion and Order as to why he overruled the Motion to Reopen and does not believe that a Petition for Reconsideration is the proper place to ask for an explanation of why he believed one piece of evidence over the other. The Administrative Law Judge has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997).

The Administrative Law Judge 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 adverse party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

To the extent not answered above, the ALJ overrules the Petition for Reconsideration.

On appeal, Kentucky Cardiology argues the only evidence supporting the ALJ's decision is Elmore's "unsubstantiated testimony". It argues Elmore testified she had not worked and had no W-2s or 1099s for 2018 and 2019, but admitted she filed joint tax returns with her husband. Kentucky Cardiology overlooks Elmore's testimony that joint returns were filed in order to receive tax credits. Kentucky Cardiology also argues the fact that Elmore was listed as an organizer for the salon is inconsistent with her testimony regarding her ownership/employment with the business. Kentucky Cardiology argues Elmore's listing as the organizer of the business indicates she returned to work on July 3, 2019. It argues this is supported by the surveillance report and video. Kentucky Cardiology also correctly admitted it must show Elmore "is engaging in services to another in return for remuneration of a regular and sustained basis in a competitive economy in order to show a return to work". However, it argues the "ALJ incorrectly places a burden on the petitioner/employer to submit evidence of wages, which is outside of the petitioner/employer's control". We note Kentucky Cardiology's argument that Elmore failed to provide copies of her tax returns in her response to its Request for Production of Documents; however, there is no record that it ever attempted to compel her compliance, and apparently, no mention was made of any deficiency

until it filed its brief before the ALJ. We additionally note Kentucky Cardiology's argument that the ALJ could not rely upon Elmore's testimony because it was clearly contradicted.

Kentucky Cardiology had the burden of proving Elmore is no longer entitled to PTD benefits. Since Kentucky Cardiology was unsuccessful in that burden, the question on appeal is whether the evidence compels a finding in its favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as that which 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).

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). 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. 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). The 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 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). With that standard in mind, we find no error.

KRS 342.125(3) as amended in July 2018 states as follows:

Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., **or for reducing a permanent total disability award when an employee returns to work**, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or original order granting or denying benefits, when such an award or order becomes final and nonappealable, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party. Orders granting or denying benefits that are entered subsequent to an original final award or order granting or denying benefits shall not be considered to be an original order granting or denying benefits under this subsection and shall not extend the time to reopen a claim beyond four (4) years following the date of the final, nonappealable original award or original order. (Emphasis added).

KRS 342.001(34) defines "Work" as "providing services to another for remuneration on a regular and sustained basis in a competitive economy." We agree

with the ALJ there is no evidence Elmore returned to work as contemplated by the Act. Elmore testified she has not worked since the day of the accident, and has received no income other than workers' compensation benefits since that date.

Pursuant to KRS 342.125(3), whether Elmore retains the capacity to work is irrelevant. Kentucky Cardiology failed to satisfy its burden of demonstrating Elmore had indeed returned to work as defined by the Act. While Elmore may have been listed as the organizer of an LLC, there is no evidence she worked there as contemplated by the Act or that she has received any wages or income, other than her workers' compensation benefits. Payments made by Mann to satisfy a loan does not constitute a return to work.

Substantial evidence exists supporting the outcome selected by the ALJ. We acknowledge Elmore's name was listed as an organizer in the Articles of Organization, which was purportedly later amended. We also acknowledge she wore a shirt with the spa logo and provided testimonials regarding the benefits she has received from using CBD products. However, there is no evidence demonstrating Elmore has actually returned to work, and therefore, we find the ALJ did not err in his determination.

Finally, we note the ALJ indicated Kentucky Cardiology's motion to reopen was not timely. We disagree. The four-year time limitation set forth in KRS 342.125(3) does not apply when the reopening is sought for the purpose of reducing a permanent total disability award. The first step in the process is to establish whether the injured worker has returned to work. Since the ALJ determined she has not, his subsequent incorrect statement concerning the timeliness of the motion is

unnecessary. Therefore, we determine the added language regarding the timeliness amounts to no more than harmless error, and has no bearing on the determination of whether Elmore has returned to work.

Accordingly, the decision rendered August 7, 2020, and the Order ruling on the Petition for Reconsideration issued September 8, 2020 by Hon. John M. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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