Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **November 30, 2018**

CLAIM NO. 201780298

STANTON NURSING AND REHAB CENTER PETITIONER

VS.

APPEAL FROM HON. JOHN H. McCRACKEN,
ADMINISTRATIVE LAW JUDGE

LEZLEY DOTSON
And HON. JOHN H. McCRACKEN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Stanton Nursing & Rehab Center ("Stanton") appeals from the July 20, 2018 Opinion, Award and Order and the August 24, 2018 Order rendered by Hon. John H. McCracken, Administrative Law Judge ("ALJ"), awarding Lezley Dotson temporary total disability benefits, permanent partial

disability benefits, and medical benefits for a work-related low back injury. On appeal, Stanton argues the decision is not supported by substantial evidence. We affirm.

Dotson worked at Stanton as a state-registered nursing home assistant beginning in August of 2012. She assisted residents with activities of daily living, including feeding, bathing, changing clothes, and grooming. The job required her to lift, tug and pull. On May 18, 2017, she and a co-worker were putting a resident to bed with the use of a Hoyer lift. The resident resisted and Dotson felt a pop and pain in her lower back. Dotson reported her injury, took ibuprofen, and completed her shift. The following morning, she felt excruciating pain in her back and right hip with pain into her leg.

The next day, Dotson visited Sarah Howell, APRN, who diagnosed work-related acute back pain. Howell obtained a June 14, 2017 lumbar MRI, which revealed mild degenerative disc disease in the lumbar spine. The reviewing physician noted a right paracentral disc bulge with annular tear at L3-L4 producing mild to moderate canal stenosis, a central disc bulge with annular tear at L4-L5 producing mild canal stenosis, and a small right foraminal disc bulge at L1-L2 with slight encroachment of fat in the proximal right neuroforamen. He also found congenital canal stenosis at L2, L3 and L4 secondary to short pedicles. On September 1, 2017, Howell diagnosed a work-related low back injury and sciatica, right side. In an undated statement filed on May 23, 2018, Howell stated Dotson may return to work with restrictions of no lifting, pushing, or pulling over ten

pounds. She also is restricted from engaging in frequent, repetitive motion of her back, including twisting, bending, or stooping.

The parties filed medical evidence documenting treatment prior to the work injury for a low back condition. Dotson acknowledged she had previously treated with Howell for low back pain, but denied any symptoms within six months of the May 18, 2017 incident. Howell's records indicate she treated Dotson on October 21, 2015, for complaints of low back pain and some stiffening for two weeks with no known injury. Howell noted Dotson was taking Neurontin obtained from her sister, and she rewrote the prescription. At a November 13, 2015 follow-up, Howell noted Dotson had continued the Neurontin regimen. On February 16, 2016, Dotson presented for treatment of migraine headaches and obesity, but the records do not indicate any low back complaints or treatment. Howell's notes indicate Dotson was either not taking Neurontin or taking it as needed. On December 28, 2016, Howell treated Dotson for sinusitis with no reference to back pain. The note that day indicates Neurontin is discontinued. Dotson presented on March 3, 2017 for a swollen lymph node. There is no complaint or examination of the back.

Dotson also received treatment at the Lexington Clinic on January 20, 2010 for migraine headaches and chronic low back pain radiating into her right leg. At an October 25, 2011 visit for complaints of migraines, low back pain is listed under "significant diagnosis," though there is no discussion of or treatment ordered for a back condition. On April 27, 2012, Dotson presented for follow-up treatment for migraines. The note again includes the diagnosis of low back pain without any discussion of the condition. On February 7, 2013, Dotson reported a 1 to 2 week

history of intermittent lower back pain. A March 7, 2014 note includes the diagnosis of low back pain in her "problem list" but notes "no back pain; no neuromuscular/connective/soft tissue complaints; no nonspecific musculoskeletal pain, swelling, and stiffness."

Dr. Ellen Ballard conducted an independent medical evaluation ("IME") on October 10, 2017, which included a review of Dotson's treatment for low back pain prior to the work accident. When specifically asked whether she ever had low back pain or taken her sister's Neurontin, Dotson denied both. Dr. Ballard diagnosed low back pain, degenerative disc disease, and intermittent right leg symptoms, status post work injury. Because Dotson had a prior history of low back pain and intermittent right leg symptoms, Dr. Ballard could not definitively conclude which portion of her symptoms were due to the work injury and which portion was pre-existing.

In a February 5, 2018 supplemental report, Dr. Ballard assigned a 7% impairment rating based upon a lumbar DRE Category II rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). She concluded 50% of the impairment was pre-existing based on the prior records. Dr. Ballard then stated Dotson would have had a 5% impairment prior to the work injury. She opined Dotson could not return to her job at Stanton due to the pre-existing back problems. In a second supplemental report dated April 9, 2018, Dr. Ballard stated Dotson had a 2% impairment as a result of the work accident.

Dotson returned to work at Stanton as a hospitality aide on September 26, 2017. This position was less strenuous than her regular employment. She testified she could not have performed her prior work at Stanton due to her back pain. A few months later, Dotson was informed she was terminated because Stanton could not accommodate the restrictions recommended by Dr. Ballard for her pre-existing condition. Dotson last worked on November 8, 2017. She subsequently obtained a degree as a Certified Medical Assistant ("CMA") and began working at Clay City Pediatrics and Primary Care. Her duties include taking patient vital signs, administering injections, and administrative tasks. She earns $490.75 a week, which is less than what she earned at Stanton.

Dr. Frank Burke conducted an IME on March 8, 2018. He noted a prior history of a pulled muscle in her lumbosacral spine that quickly resolved and did not require follow-up treatment. Dr. Burke concluded Dotson sustained an acute lumbosacral strain with the development of annular tears in her lumbosacral spine with associated radicular pain pattern on the right at work on May 18, 2017. He assigned a 7% impairment rating pursuant to the AMA Guides. Dr. Burke stated any Dotson had no symptomatic or impairment-ratable low back condition prior to the work incident.

Dr. John Vaughan conducted an IME on April 17, 2018. Dr. Vaughan specifically asked Dotson if she had back problems prior to the work incident on May 18, 2017, and he indicated that she initially denied any problems. However, she then recounted a prior back episode in September 2015 for which she sought treatment from Howell. Dr. Vaughan reviewed the treatment records from

2010 through 2014 of the Lexington Clinic, and Howell's notes from October 21, 2015 through November 13, 2015. He noted Dotson has predominantly axial/mechanical low back pain with some lesser symptoms of radicular pain in her right leg. She did not have objective evidence of radiculopathy. The 2017 lumbar spine MRI showed degenerative changes at L3-L4 and L4-L5 discs with bulging, but no high-grade nerve impingement or stenosis. Dr. Vaughan diagnosed lumbar spondylosis and assigned a 5% impairment rating based upon a DRE Category II pursuant to the AMA Guides. Because of Dotson's low back problems from 2010 through 2015, her impairment was pre-existing and active before the May 18, 2017 work accident. He opined that if she had been seen prior to the work accident she would have had a 5% impairment. Dr. Vaughan assigned restrictions of no lifting greater than 30 to 40 pounds, but he attributed the restrictions to the pre-existing active back problem rather than to the work accident. He also opined Dotson could return to her prior work.

The ALJ discussed causation and whether Dotson suffered a pre-existing active condition:

> Admittedly, it appears as though Ms. Dotson was not a good oral historian regarding her prior low back problems. However, she discussed them once shown the records, or questioned regarding her treatment. The ALJ does not believe that she intended to deceive anyone. All of the examining doctors had access to her prior records and discussed her prior back condition. They just disagree the extent and impact of her prior low back problems. But, the burden of proof for the defense of a prior active impairment as a carve out is on the Defendant.

> In order to be characterized as an active condition an underlying pre-existing condition must be symptomatic and have impairment pursuant to the AMA Guides immediately prior to the occurrence of the work related injury. In Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007).
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> While both Dr. Ballard and Dr. Vaughan state that Ms. Dotson had a prior impairment, there is insufficient proof to find that it was actively symptomatic immediately prior to the May 18, 2017 work injury. Her last back treatment and complaints of pain were on October 21, 2015. There is no proof in the record that she continued to have low back pain, nor pain radiating into the right leg, after that office visit up until the date of the work accident. Further, the ALJ disagrees with Dr. Vaughan's description of her low back problems in the Lexington Clinic records. The 2011, 2012 and 2014 office visits did not contain complaints of low back pain of any sort. It was stated in the record, but not as a reason for her office visit. The 2013 office visit does mention low back pain, but there is also a urinary issue and a note that she had seen her gynecologist. This record is not conclusive that the reason for her visit was for low back pain from a degenerative condition, or a urinary tract condition.
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> The ALJ does not find the opinions of Dr. Ballard and Dr. Vaughan as persuasive as those of Dr. Burke regarding causation. The ALJ finds that Dr. Burke had sufficient information regarding her prior low back complaints to render his opinions on causation substantial evidence.
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> The ALJ relies on Dr. Burke to find that Ms. Dotson sustained a 7% impairment to her low back as a result of her May 18, 2017 work injury, with no carve-out for any prior active condition.

The ALJ also evaluated whether Dotson is entitled to enhanced benefits because she lacks the physical capacity to return to her pre-injury employment:

> Both Dr. Ballard and Dr. Burke opined that Ms. Dotson could not return to her prior work for Defendant. Ms. Dotson testified that the lifting, pushing, tugging, and pulling requirements were too much for her to return to that type of work as a CNA. She testified that she was trying to lift a 450 pound person when she sustained her injury. Sarah Howell, APRN, recommended restrictions that would effectively prevent her from returning to that type of work. Ms. Howell restricted her from performing any heavy lifting. She was to avoid lifting, pushing or pulling anything over 10 pounds. She was to avoid frequent, repetitive motion of her low back to include twisting, bending, and stooping. Dr. Vaughan recommended no lifting of more than 30-40 pounds. He just did not think her work injury caused those restrictions. Ms. Dotson's job required her to regularly lift, pull and tug on residents that would exceed her recommended restrictions.
>
> The ALJ relies on the testimony of Ms. Dotson, Dr. Burke, Dr. Ballard and Sarah Howell to find that Ms. Dotson does not retain the physical capacity to return to the type of work she performed on May 18, 2017.

Stanton filed a petition for reconsideration, arguing the ALJ misconstrued or misstated the evidence regarding Dotson's deception and prior medical history. The ALJ denied the petition for reconsideration as a re-argument of the case.

On appeal, Stanton argues the ALJ's decision is not supported by substantial evidence because Dr. Burke's opinion is unreliable. Stanton argues Dotson deceived the physicians by providing an inaccurate history of her prior low back condition, and there is no indication Dr. Burke reviewed the records of her pre-injury treatment for low back pain. As such, his opinion cannot be relied upon.

Because it challenges Dr. Burke's understanding of Dotson's pre-injury low back treatment, Stanton is essentially challenging the determination she suffered no pre-existing active disability. The employer bears the burden of proving the existence of a pre-existing, active disability, and to be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable prior to the occurrence of the work-related injury. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). Because Stanton 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).

As the fact-finder, the ALJ has 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 has broad authority to decide questions of causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003).

The function of the Board in reviewing an ALJ's decision is limited to determining 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).

There is substantial proof in the record to support the ALJ's conclusion Dotson suffered no pre-existing active low back condition. While there are notations of the diagnosis of back pain prior to the work injury, the records of the Lexington Clinic only reflect complaints of back pain on January 20, 2010 and February 7, 2013. Notes from Howell from November 13, 2015 through March 3, 2017 do not document any complaints regarding the back condition. Further, the prescription for Neurontin was discontinued by December 2016. Therefore, in addition to Dr. Burke's opinion, there is substantial evidence to support a conclusion the low back condition was not symptomatic immediately prior to the work incident.

Further, Dr. Burke's opinion supports the ALJ's conclusion, and we disagree his report is inherently unreliable. Certainly, there are situations where a physician has such an inaccurate history that his or her opinion is rendered lacking in probative value. Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). However, Dr. Burke reviewed Howell's records and Dr. Ballard's report, both of which contained discussions of the prior treatment. Thus, even if Dotson had provided an inaccurate history, Dr. Burke was aware of the prior treatment through

medical records. Dr. Burke's opinions are substantial evidence regarding the issues of causation and pre-existing active impairment and disability.

Next, Stanton argues the ALJ erred in awarding enhanced benefits pursuant to KRS 342.730(1)(c)(1). Although Dotson did not return to work at the same or greater wage than she earned at the time of the injury, Stanton urges that the principles of Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003) should have some application in this instance because Dotson did not leave her employment because of the effects of the injury. Rather, Dotson was planning to leave the position prior to the work event in order to obtain her CNA degree. Further, Dotson was aware Stanton does not employ CNAs.

KRS 342.730(1)(c)1 states, in relevant part:

> If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection. . .

We find no error in the ALJ's application of the three multiplier. The ALJ relied upon the opinions of Drs. Ballard and Burke that she was not able to return to her prior work for Stanton. Howell assigned restrictions that would prevent Dotson from returning to that work. Also, Dotson testified she was unable to perform the lifting, pushing and pulling requirements of that employment. An ALJ may give weight to a claimant's own testimony regarding her retained physical capacity and occupational disability. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

This proof constitutes substantial evidence to support application of the three multiplier.

Dotson's plan to seek certification as a CNA and obtain other employment is immaterial to the determination of her retained physical capacity. As acknowledged by Stanton, because Dotson did not return to the same or greater wage, this is not a situation calling for a Fawbush analysis. The ALJ properly based the determination of entitlement to the multiplier upon the effects of the work injury on Dotson's ability to perform the job she was doing at the time of the injury, as required by the plain language of the statute. As substantial evidence supports the ALJ's award of the three multiplier, we affirm on this issue.

Accordingly, the July 20, 2018 Opinion, Award and Order and the August 24, 2018 Order rendered by Hon. John H. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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