

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 12, 2020

CLAIM NO. 201469748

TERESA STEWART

PETITIONER/
CROSS-RESPONDENT

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

GOOD SAMARITAN CENTER;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE; AND
HON. ANDY BESHEAR,
KENTUCKY ATTORNEY GENERAL

RESPONDENTS/
CROSS-PETITIONERS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Teresa Stewart (“Stewart”) appeals from the Opinion and Order rendered December 11, 2018 by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ found Stewart’s condition has worsened since the July 20, 2015 decision rendered by Hon. Thomas G. Polites (“ALJ Polites”). ALJ

Polites found Stewart sustained a compensable work-related low back injury on August 31, 2014 while working as a staff nurse for Good Samaritan Center (“Good Samaritan”) awarding temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits. On reopening, the ALJ determined Stewart is now permanently totally disabled due to her work injury. Good Samaritan cross-appeals from the ALJ’s determination and from the January 18, 2019 order on reconsideration.

On appeal, Stewart argues the ALJ erred in retroactively limiting the duration of her award of permanent total disability benefits pursuant to KRS 342.730(4) effective July 14, 2018. Stewart also argues the retroactive application of KRS 342.730(4) is unconstitutional. On cross-appeal, Good Samaritan argues the record does not support the ALJ’s finding that Stewart is now permanently totally disabled. We find the ALJ’s decision is in conformity with the holding by the Kentucky Supreme Court in Holcim v. Swinford, 581 S.W.3d 37 (Ky. 2019). We also note this Board lacks the authority to make determinations on constitutional issues. We additionally find the ALJ made the appropriate analysis in determining Stewart is now permanently totally disabled, and his decision is supported by the record. Therefore, we affirm on all issues.

Stewart filed a Form 101 on October 10, 2014, alleging injuries to her back, right leg, and right foot on August 31, 2014 while working for Good Samaritan. She stated a patient was being picked up by a mechanical sling. He started to fall out of the sling, and she grabbed him to prevent a fall. She immediately experienced back pain. Stewart completed the tenth grade and later

obtained a GED. She subsequently obtained an LPN certification. She also received specialized training in wound care. On July 20, 2015, ALJ Polites determined Stewart sustained a work-related back injury on August 31, 2014. He awarded TTD benefits, PPD benefits based upon an 8% impairment rating assessed by Dr. Warren Bilkey, enhanced by the three multiplier contained in KRS 342.730(1)(c)1, and medical benefits.

Good Samaritan filed a motion to reopen the claim on September 30, 2016, challenging surgery proposed by Dr. R. Kirk Owens, II. Dr. Owens with Norton's Women's and Kosair Children's Hospitals, recommended a lumbar fusion at L4-L5. Good Samaritan argued Stewart sustained an intervening fall on June 27, 2016 necessitating her surgery. Stewart filed a motion to reopen on December 5, 2016, asserting a worsening of her condition. Hon. Robert L. Swisher, Chief Administrative Law Judge, entered an order on December 28, 2016, reopening the claim. The claim was subsequently assigned to the ALJ.

Stewart testified by deposition, and at the hearing held before ALJ Polites. Since he determined she sustained a compensable work injury, we will not review that testimony. After the claim was reopened, Stewart testified by deposition on March 21, 2017, and again on June 6, 2018. She also testified at the hearing held October 6, 2018. Stewart was born on July 1, 1961. On August 31, 2014, Stewart was employed as a staff nurse supervisor for Good Samaritan. This position involved general nursing duties as well as supervising staff who worked with twenty residents. She was required to pass medicine, push carts, push residents in wheelchairs, and assist with moving residents. On August 31, 2014, she was

assisting with lifting a resident by using a mechanical lift. When the resident slipped, she grabbed him to prevent a fall, and injured her low back. She has not worked for Good Samaritan since August 31, 2014. She attempted to drive for LYFT in 2015, but was only able to do that for a short period. She also attempted to work for a friend in home health, but was only able to work four eight-hour shifts. She testified she applied for numerous jobs online, but has not done so since late 2016.

Surgery was initially recommended in March 2015, but Stewart declined because she was afraid of undergoing anesthesia. She stated her condition worsened briefly when she slipped, but did not fall, on her back step in June 2016. She improved from that incident after a couple of weeks, but the residuals from the August 2014 work injury continued to worsen. Stewart underwent lumbar fusion surgery on January 2, 2017. She wanted to have physical therapy afterward, but could not afford to pay for it. She testified she initially experienced a lot of improvement, but her condition gradually worsened. She continues to have low back, right hip, and right leg pain. She also has intermittent numbness in the right leg into her right foot when she maintains a single position for too long. She additionally testified she has immediate, emergent bowel movements if she lifts in excess of fifteen pounds.

Stewart does not believe she can perform any work due to her physical limitations regarding lifting, bending, twisting, etc. She specifically does not believe she could perform any of the duties required of nursing. She has limited ability to sit, stand, walk, or drive. She also testified she has difficulty in getting dressed. She also testified she can no longer engage in gardening due to her inability to kneel or

bend. In addition to her ongoing problems with low back, right hip, and right leg pain and numbness, she treats with Dr. Robert Palmer-Ball for depression, anxiety, hypertension, GERD, and restless leg syndrome (which pre-existed the August 31, 2014 injury date). She takes various medications to treat those conditions. She also uses ice and heating pads to treat her back pain.

Dr. Bilkey evaluated Stewart on February 14, 2017. He had previously evaluated her in the original claim on January 19, 2015. He noted she had undergone an L4-L5 decompression and fusion by Dr. Owens on January 2, 2107. He additionally noted she experienced low back pain after slipping on a step at home in June 2016. Dr. Bilkey opined Stewart had sustained a work-related low back injury on August 31, 2014. He stated she sustained a lumbar strain aggravating her degenerative spondylolisthesis and lumbar stenosis. He also noted she had undergone the lumbar fusion surgery six weeks prior to his examination. He stated the work injury caused her lumbar problems and need for surgery. He believed all of her treatment was reasonable and necessary. He also stated she had not yet reached maximum medical improvement (“MMI”) following her surgery. He stated she would qualify for a 20-23% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”) once she reached MMI.

Dr. Gregory Nazar evaluated Stewart on July 24, 2018. He diagnosed Stewart with degenerative spondylolisthesis, work-related L4-L5 foraminal stenosis, nerve root compression, and radiculopathy producing back and right leg pain, numbness, and tingling brought into disabling reality by the August 31, 2014 work

injury. He determined she had reached MMI by January 2, 2018. Dr. Nazar assessed a 22% impairment rating pursuant to the AMA Guides. He also stated Stewart should avoid lifting, carrying, pushing, or pulling greater than fifteen pounds, and should change positions frequently. He also advised her to not engage in sitting, standing, or walking for more than twenty minutes at a time. Dr. Nazar stated Stewart is unable to perform the duties required of an LPN.

Dr. Stacie Grossfeld evaluated Stewart at Good Samaritan's request on February 15, 2018. She noted the history of injury and surgery. She stated Stewart had reached MMI as of December 29, 2017. She diagnosed Stewart with degenerative spondylolisthesis necessitating back surgery on January 2, 2017. She also noted Stewart is morbidly obese. She assessed a 20% impairment rating pursuant to the AMA Guides. She also stated Stewart could return to work as an LPN, but should not lift greater than seventy-five pounds.

Dr. Gregory Gleis evaluated Stewart at Good Samaritan's request on October 18, 2016. He noted Dr. Joseph Werner recommended Stewart undergo an L4-L5 decompressive laminectomy and fusion on March 27, 2015, long before the date she slipped on a step at home. He noted Stewart's complaints of low back, right buttocks and right leg pain. Dr. Gleis stated the proposed fusion surgery was reasonable due to her right leg radicular symptoms because of the aggravation she suffered when she slipped on her back step on June 25, 2016.

The ALJ rendered an Opinion and Award on August 21, 2017 finding compensable the medical bills/treatment contested by Good Samaritan. The ALJ specifically stated *verbatim* as follows:

The Defendant Employer has moved to reopen this claim to challenge the compensability of fusion surgery. After review of the evidence, it is determined that the opinion of Dr. Bilkey is persuasive in that the slip and fall incident of June 27, 2016, resulted in a temporary exacerbation of back pain and not an aggravation of her underlying condition. He also convincingly stated that the slip and fall incident did not significantly change her back and was not the reason she needed back surgery. He found that there was no significant aggravation of her condition following the June 2016 event and noted that Dr. Werner previously recommended the same surgery that Dr. Owen ultimately performed. This opinion has convinced the ALJ and the ALJ therefore finds that the requested surgery is reasonable necessary and causally work-related.

Good Samaritan did not raise the compensability of the treatment or surgery in its cross-appeal. At the Benefit Review Conference held October 16, 2018, the only issue raised was whether Stewart's condition had worsened, and if so, the extent of benefits to which she may be entitled.

In his decision rendered December 11, 2018, the ALJ determined Stewart's condition has worsened, and she is now permanently totally disabled. He awarded those benefits beginning July 20, 2015. The ALJ specifically found as follows:

1. The sole issue in this matter is the extent of the worsening of the Plaintiff's condition. There is a consensus of opinion that the numerical impairment rating has increased in that Dr. Grossfeld has assessed a 20% rating while Dr. Nazar assessed a 22%. The award issued by ALJ Polites was based upon a 8% whole person impairment.

2. The ALJ is persuaded in this matter by the credible testimony of the Plaintiff who explained in detail that she must sit in order to cook or do dishes in her home, that she cannot shop for groceries without

assistance, and that she cannot lift more than a gallon of milk.

3. Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (KY 2001).

4. “Work” is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton*, 34 SW3d 48 (KY 2000). In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker’s age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of “work” under normal employment conditions. *Id.*

5. The ALJ notes that the Plaintiff has a 10th grade education with a GED and that she has worked as a nurse for twenty years. ALJ Polites found that the Plaintiff retained the ability to compete for light to medium duty work within her field. The ALJ finds that given the Plaintiff’s credible testimony regarding her current limitations, her advanced age, and her work history requiring lifting, along with her considerable restrictions including no lifting, carrying, pushing, and pulling more than 15 pounds, the ALJ finds that this Plaintiff does not retain the ability to provide services to another in return for remuneration on a regular and sustained basis in a competitive economy. The ALJ therefore finds that the Plaintiff is permanently and totally disabled.

Good Samaritan filed a petition for reconsideration. It argued the evidence does not support the award of permanent total disability benefits. It also

argued the ALJ erred in awarding the increased benefits effective July 20, 2015. Good Samaritan pointed out Stewart did not file a motion to reopen asserting a worsening of her condition until December 5, 2016. It argued the date any increase commences is the date the motion to reopen is filed in accordance with the holding in James T. English Trucking v. Beeler, 375 S.W.3d 67 (Ky. 2012).

In the January 18, 2019 order on reconsideration, the ALJ found *verbatim* as follows:

This matter is before the ALJ upon the Petition for Reconsideration filed by the Defendant seeking a reconsideration of the finding of permanent total disability and a correction of the commencement date thereof. Having reviewed said Petition and the Response thereto, the ALJ finds that the Petition fails to point out patent error with respect to the finding of permanent total disability but that the Petition is **GRANTED** with respect to the commencement date thereof.

Accordingly, the following **AMENDED AWARD AND ORDER** is hereby issued:

AMENDED AWARD AND ORDER

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Plaintiff, Teresa Stewart, shall recover from the Defendant, Good Samaritan Center, and/or its insurance carrier the sum of \$661.86 per week for 100% permanent disability commencing on December 5, 2016, and continuing for so long as she is so disabled, together with interest at the applicable statutory rate on all past due and unpaid installments of such compensation such that 12% interest is to be paid on amounts due up to and including June 28, 2017, and 6% interest is to be paid for past due amounts thereafter. All benefits shall terminate pursuant to KRS 342.730(4).

2. Plaintiff shall recover of the Defendant-employer and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances as may be reasonably required for the cure and relief from the effects of the work-related injury. The Defendant's obligation shall be commensurate with the limits set by the Kentucky Medical Fee Schedule.

We initially note Stewart argues the statutory changes to KRS 342.730(4) effective July 14, 2018 do not apply to her claim. The changes reflected to House Bill 2 became effective July 14, 2018. Section 13 of that bill amended KRS 342.730(4) to provide as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs. In like manner all income benefits payable pursuant to this chapter to spouses and dependents shall terminate as of the date upon which the employee would have reached age seventy (70) or four (4) years after the employee's date of injury or date of last exposure, whichever last occurs.

In accordance with the holding by the Kentucky Supreme Court in Holcim v. Swinford, *supra*, we affirm the ALJ's application of KRS 342.730(4) as amended in 2018. There the Kentucky Supreme Court determined the amended version of KRS 342.730(4) regarding the termination of benefits at age seventy has retroactive applicability. We therefore find Stewart's award is governed by the limitations set forth in the amended statute.

We additionally note that this Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute. Blue Diamond Coal

Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Consequently, we are without authority to render a decision upon Stewart's argument regarding the constitutionality of the amended statute. Thus, we affirm.

Good Samaritan argues the record does not support an award of permanent total disability benefits. As the claimant in a workers' compensation proceeding, Stewart had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Stewart was successful in her burden, we must determine whether substantial evidence of record supports 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). 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 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 note that permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work because of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining whether Stewart is permanently totally disabled, the ALJ was required to perform an analysis pursuant to the City of Ashland v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015), and Ira A. Watson Department Store v. Hamilton, supra.

Although not specifically citing to those cases, the ALJ appropriately performed an analysis pursuant to the required factors set forth in City of Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra. The ALJ took into consideration the correct factors in finding Stewart is permanently totally

disabled. The ALJ took into account Stewart's age, education, and past work experience, along with her post-injury/surgical physical status. The ALJ clearly explained the basis of his decision. The ALJ outlined the evidence he reviewed, provided the basis for his determination that Stewart's condition has worsened, and she now is permanently totally disabled due to her work-related injury. The ALJ properly analyzed the claim, and his decision falls squarely within his discretion. Therefore, the ALJ's determination on this issue will remain undisturbed.

Accordingly, the December 11, 2018 Opinion and Order and the January 18, 2019 Order on petition for reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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