RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000308-WC

JOHNNY COLE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-72367

SPECIALTY TRANSPORTATION;
HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES.

GUIDUGLI, JUDGE. Johnny Cole (hereinafter "Cole") has petitioned the Court for review of the Workers' Compensation Board's (hereinafter "the Board") January 15, 2003, opinion affirming the decision of the Administrative Law Judge (hereinafter "ALJ"). Cole argues that the ALJ used incompetent and prohibited evidence in terminating total temporary disability payments and erred in determining that his back

injury was not caused by treatment for his work-related knee injury. We have thoroughly reviewed the record, the parties' arguments and the applicable law, and believe that the Board did not err in this matter. Hence, we affirm.

We adopt that portion of the Board's opinion that sets forth the facts as follows:

> Cole is a 40-year-old male who resides in Madison County, Kentucky. He went to school through the seventh grade and is able to read and write only to a limited extent. His work history consists of employment as a factory worker in a tobacco warehouse, a groundskeeper at various facilities, a service washer, and a truck driver. He went to work for [Specialty Transportation Services] STS in January of 1999 as a truck driver.
>
> On July 11, 1999, Cole sustained an injury to his right knee when he jumped down from the trailer of his truck onto the ground. He felt a popping sensation, for which he sought medical treatment and was taken off work. Four days later, Cole returned to his regular duties and dislocated the same knee while swinging open the door to his truck. He subsequently underwent three surgical procedures on the right knee, each one intended to address ongoing problems with instability and popping and dislocation of the patella. The first procedure was on October 25, 1999; the second was on March 8, 2000; and the third and final operation was on January 17, 2001. Cole had to wear a knee brace due to the persistent weakness in his right leg following the third operation, and complained of problems with swelling of the knee inside the brace at the final hearing. He also utilized a cane to avoid falling down.

Cole attended physical therapy for his knee three times per week at various intervals over a two-year period following his second surgery. It was during one of his physical therapy sessions, on March 7, 2001 [following his third surgery], that Cole alleges he sustained an injury to his low back. Cole testified that he was performing leg raises while lying on his stomach in order to rehabilitate his knee when he felt a popping sensation in his back. When questioned specifically at the final hearing about some discrepancies in the mechanism of injury recorded in the medical records and his own testimony, Cole made it clear that his understanding is that "straight leg raising" is done while "lying flat on [one's] back." His own explanation for why the mechanism of injury to his back would have been recorded as "straight leg raising" if he was lying on his stomach at the time was, "I might have told somebody that, you know. You know, distracted from the pain and stuff, you know, I might have. I'm not saying that I did say it or I'm no saying that I didn't." Cole further testified that the physical therapy session on March 7, 2001, was discontinued after he reported the pain in his back.

The physical therapist's records for March 7, 2001, make no mention of any complaint of back pain or injury arising. The therapist documents only that the patient was "very happy with stability of knee" and reported improvement in range of motion. There is no indication that the session was prematurely discontinued or otherwise out of the ordinary. However, the next notation in Cole's physical therapy chart dated March 14, 2001, indicates that Cole complained of a burning pain on that date developing in his low back "while doing SLR" during his March 7, 2001 visit and that the symptoms had worsened in the interim.

> Cole testified that he did not attend therapy over the week between March 7th and March 14th due to the pain in his back. Specifically, he was not in physical therapy on March 8, 2001. It was his recollection that he saw his family physician, Dr. Pittman, on or around March 9, 2001. No records from Dr. Pittman were filed into evident. Cole also testified to receiving telephone calls from both the physical therapist and his nurse case manager on the evening of March 7, 2001, inquiring as to his status following his complaints of back pain during the session earlier that day. Other than Cole's testimony, the record contains no other evidence regarding the alleged telephonic communications.
>
> Nevertheless, Cole was referred to and evaluated by Dr. James Bean, Dr. Phillip Tibbs and Dr. Emily Rayes for his back complaints. Dr. Bean, a neurosurgeon, first saw Cole on April 17, 2001, and ordered an MRI performed on April 26, 2001, which revealed a herniation at L5-S1 touching upon the right S1 nerve root in the lateral recess.

Following the diagnosis of the herniated disc, Cole was seen by several physicians, several whom related the back injury to exercises performed in rehabilitation of his right knee injury while others expressed an opinion that the back injury had no relationship to his work-related injury. At the Benefit Review Conference held on January 11, 2002, the parties stipulated to coverage; employment relationship; that Cole sustained a work-related knee injury on July 22, 1999; notice as to the knee injury only; that he last worked for STS on July 29, 1999; that he received temporary total disability (TTD) from

July 30, 1999 through October 29, 2001; that medical expenses had been paid in the amount of $46,063.57; that Cole's date of birth was March 17, 1962; and that he has a 7th grade education and a Commercial Driver's License (CDL). Contested issues were causation/relatedness of the low back and psychological claims; medical expenses related to the low back and psychological claims; overpayment of TTD; notice as to the low back injury; extent and duration of his injures; and, average weekly wage.

Upon review of the evidence and testimony, the ALJ concluded the following:

> Based upon the entirety of the record herein, and after having had the opportunity to observe and speak with [Cole] herein, it is the opinion of this ALJ that [Cole] can prevail only upon his knee injury. Although [Cole] has undergone three separate surgeries to his right knee, it appears that he has finally obtained some stability. I find that the testimony from Dr. Owen to be more persuasive, as it relates to [Cole's] knee impairment. He assessed a 15% impairment rating, which I find to be more accurate, especially in view of the deposition given by Dr. Ballard, who admitted that an accurate impairment rating was difficult to assess. Nonetheless, I further note that [Cole] underwent an examination relative to his CDL license and was cleared for same on March 28, 2001, just a few months after his last surgery. [Cole] had basically answered NO to all questions regarding any impairments, including chronic law back pain, and I therefore find that [Cole] can return to his former employment, and his award shall therefore be calculated under KRS 342.730(1)(b).

As it concerns [Cole's] alleged back injury during therapy, I am not so persuaded. I find it very peculiar that no mentioning (sic) was made during the therapy session as such things would certainly be noted by the staff. Dr. Travis also noted this discrepancy, and both he and Dr. Ballard concluded that [Cole's] back problems, were not as a result of any work related or therapy activities. For these reasons, [Cole's] claim for a back injury will hereinafter be dismissed. I also noted for the record that [Cole] during the hearing held herein, would periodically turn around to his wife, who sat behind him, to ask her questions, without evidence of any discomfort whatsoever.

[Cole's] claim for a work related psychiatric too must fail. The history given to Dr. Mohler, in regards to earlier treatments, differs from that given to Dr. Cooke. Although that in and of itself may not be too significant in this case, I do find that [Cole's] performance on the psychological test, administered by both doctors, indicated less than truthful responses. In fact, Dr. Cooke found [Cole] to be outright malingering.

[STS] has raised the issue of overpayment of TTD for both time and rate. The wage records submitted by [STS] indicates that [Cole's] award was $691.45 per week, however, [Cole] argues that he should be entitled to $820.00 per week. According to the wage records, there were no weeks in which [Cole] made that high a wage, and I thus find [STS'] calculations to be more accurate thereby entitling [Cole] to a TTD rate of $460.97 per week. He was thus overpaid by $5.12 per week. Furthermore, I find persuasive the argument by [STS], that [Cole's] TTD payments should have ceased on March 28, 2001, when he was declared fit to drive a truck. Therefore, [STS] shall be entitled to take credit for any overpayments

> made for the weeks subsequent to that date, so long as same does not interfere with the principles set forth in the Stratemyer case.

Cole appealed the ALJ's opinion and award to the Board arguing the ALJ erred when she terminated TTD benefits (March 28, 2001), the evidence she relied upon to make such a determination, and her finding that the back injury was not compensable. Upon review, the Board affirmed the ALJ in toto. As to the use of Cole's application for a CDL, the Board extensively addressed this issue as follows:

> We next turn to Cole's argument that the ALJ inappropriately relied upon documentation relating to renewal of his CDL to make findings concerning his ability to return to work as a truck driver. Cole submits that it is unclear whether the ALJ relied merely upon the statements made by him within the medical examination report or upon the medical clearance reflected by the certificate that accompanied the report. Cole maintains error in either case. He asserts that a claimant's own testimony concerning his ability to perform his pre-injury work is not competent evidence upon which to base a finding that he is capable of engaging in that work in the presence of expert medical opinion to the contrary. If Cole is correct, then it would be error for the ALJ (sic)have terminated TTD benefits on March 28, 2001, and deny Cole the benefit of the multiplier set out in KRS 342.730(1)(c)1 based solely upon his application for renewal of his CDL and representations made by him within the medical examination report.
>
> Cole further argues that, in the event the ALJ relied upon the medical clearance filed with the examination report as

evidence of his ability to drive a commercial truck, then she committed error on two counts. First, such reliance would exceed the "statistical purposes" for which the documentation was purportedly filed, as it would draw on the substance of the opinion of the medical examiner. Second, as the examiner was a nurse and not a medical doctor, it would be error for the ALJ to rely upon the medical clearance as opinion testimony of a physician.

Cole points out that the documents were not tendered as a medical report but, by terms of the notice of filing, submitted for "statistical purposes" only. Cole argues that the documents could not have been tendered as a medical report as they do not meet any of the requirements set out in 803 KAR 25:010, Section 9, for filing such reports. Primarily, the documents were not completed or signed by a "physician."

Cole is correct that the "Medical Examination Report" and "Medical Examiner's Certificate" do not meet the criteria for "medical reports" set out in 803 KAR 25:010, Section 9. That section of the regulations specifically refers to reports by "physicians," which is defined in KRS 342.0011(32) as "physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting with (sic) the scope of their license issued by the Commonwealth." This definition does not include nurses. That is not to say, however, that a party may not offer opinion testimony from a nurse, or a physical therapist, vocational counselor, structural engineer, biologist, or any other person duly qualified as an expert in accordance with the Kentucky Rules of Evidence, adopted by reference in 803 KRS 25:010, Section 12. In other words, the mere fact that the documents tendered were not the report of a medical doctor does not, in and of itself,

tender them inadmissible for anything other than “statistical purposes,” and nothing contained in this decision should be so construed.

That being said, the documents in question were, in fact, tendered by STS for “statistical purposes”. Although this term is defined nowhere within the statute or the regulations, we, like Cole, presume it to mean that they were filed pursuant to 803 KAR 25:010, Section 12(2). That regulation is the only mechanism by which a party could have filed the documents in question by way of notice. It authorizes a party to file “as evidence before the administrative law judge pertinent material, and only relevant portions of hospital, educational, Office of Vital Statistics, Armed Forces, Social Security, and other public records.” The regulation goes on to state that the opinion of a physician contained within such records may not be considered in violation of the two-physician limit established in KRS 342.033. That is the only specifically stated limit on the ALJ’s discretion with respect to consideration of these public records. (Footnote omitted). We have often struggled with what constitutes permissible reliance upon records submitted pursuant to Section 12 of the regulation in question. Our task here is not to define every acceptable use, but rather is limited to determining whether the ALJ’s reliance upon the particular records in question in the case sub judice was improper.

We agree with Cole that any reliance upon the report and certificate as substantive evidence of an expert medical opinion that he was physically capable of driving a commercial vehicle would have been improper. We also appreciate that the ALJ’s reference to Cole’s being “cleared” and “declared fit” to drive a commercial vehicle might, at first blush, suggest that she gave just such weight to this evidence.

Certainly, the ALJ could have more clearly stated the nature of her reliance upon the CDL medical examination report and certificate. However, even if the ALJ considered the report and certificate as evidence of a medical opinion concerning Cole's physical abilities, we believe such error to be harmless. It will be noted that, so long as there is other evidence of record of substantial probative value to support the conclusion of the ALJ, then her reliance upon the material contents of records submitted for "statistical purposes" is harmless error. Evans v. Payne, Ky., 258 S.W.2d 919 (1953); White Construction Company v. City of Madisonville, 275 Ky. 418, 121 S.W.2d 55 (1938).

Significantly, the ALJ in addition expressly stated that she was influenced by the representations made by Cole within the report. Cole testified that the only reason he applied for renewal of his CDL was at the urging of the nurse case manager assigned by the workers' compensation carrier to his claim. However, he also stated that at the time he underwent the CDL examination, no one had told him he would not be able to return to work as a truck driver, and that was his intention. Whatever his reason, it was not unreasonable for the ALJ to take into consideration Cole's own assessment of his ability to fulfill the physical requirements of work he had in fact performed in the past. It is well-settled in Kentucky that a claimant's own testimony as to his capabilities and limitations may be relied upon by the fact-finder in making a determination as to his physical capacity to perform his pre-injury work. Com., Transp. Cabinet v. Guffey, Ky., 42 S.W.3d 618, 621 (2001); Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). The issue of retained physical capacity is an issue of fact to be determined on the basis of both the lay and medical evidence of record, and is not exclusively a medical question that can only

be resolved by way of expert medical testimony. Carte v. Loretto Motherhouse Infirmary, Ky., 19 S.W.3d 122, 126 (2000). Although the ALJ must consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely on the vocational opinions of either the medical experts or the vocational experts. Guffey, Id. at 621 (citing Eaton Axle Corp v. Nally, Ky., 688 S.W.2d 334 (1985); Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976)).

Of course, it was proper for the ALJ to infer certain physical abilities from the fact that Cole was able to either drive or ride in a tractor-trailer on various occasions from 1999 to 2001 while he was receiving TTD benefits for his knee injury. It was also within her discretion solely to accept Hisle's testimony that Cole was, in fact, employed as a truck driver during that time period. Hence, while we are not convinced that the ALJ's consideration of the CDL medical examination report and examiner's certificate were necessarily improper or went beyond the scope of the "statistical purposes" for which the documents were offered, it is nonetheless clear there was other substantial evidence of record from which the ALJ could reasonably infer that Cole retained the physical capacity to return to his employment as a truck driver. We, therefore, find nothing improper in the ALJ's fixing the date of that determination as March 28, 2001.

"Temporary total disability" is defined in KRS 342.0011(11(a) as the condition of an employee who has not reached maximum medical improvement and has not reached a level of improvement that would permit a return to employment. The court held in Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657

> (2000), that where the claimant has not yet reached maximum medical improvement, then TTD benefits are payable until such time as the claimant's level of improvement permits a return to his pre-injury work or work customary to the claimant. Moreover, the extent and duration TTD benefits should be paid in a particular case remains a question of fact to be determined by the ALJ. Hall's Hardwood Floor Co. v. Stapleton, supra; W. L. Harper Const. Co., Inc. v. Baker, Ky.App., 858 S.W.2d 202 (1993). Clearly, driving a commercial vehicle would qualify as both. While Cole testified that he ceased riding in the truck with Kaylor after March of 2001, he indicated that this was because of his back injury, which the ALJ found non-compensable.

While Cole argues vigorously that the Board erred in determining any error by the ALJ on this issue was harmless, we believe the Board properly determined that Cole's own testimony coupled with "other evidence of record of substantial probative value to support the conclusion of the ALJ" provided substantial evidence upon which the ALJ could conclude that Cole had reached maximum medical improvement. The evidence before the ALJ was conflicting and Cole's credibility was definitely an issue. When the issue is one of credibility, a reviewing body has no authority to second guess the fact-finder's decision. Paramount Food, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Moreover, the fact-finder 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 v. Fox, Ky., 19 S.W.3d 88 (2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999). Despite Cole's argument to the contrary, the ALJ's findings in this matter were based upon substantial evidence in the record and her findings were not unreasonable. See Lizdo v. Center Equipment, Ky., 74 S.W.3d 703 (2002); Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60 (2001); Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

Cole's second argument relates to the ALJ's dismissal of his low back claim. On this issue, the ALJ made the following observations and findings:

> As it concerns Plaintiff's alleged back injury during therapy, I am not so persuaded. I find it very peculiar that no mentioning [sic] was made during the therapy session as such things would certainly be noted by the staff. Dr. Travis also noted this discrepancy, and both he and Dr. Ballard concluded that Plaintiff's back problems, were not as a result of any work related or therapy activities. For these reasons, Plaintiff's claim for a back injury will hereinafter be dismissed. I also noted for the record that Plaintiff during the hearing held herein, would periodically turn around to his wife, who sat behind him, to ask her questions, without evidence of any discomfort whatsoever.

Cole argued both to the Board and this Court that the ALJ erred in relying on Dr. Travis's and Dr. Ballard's conclusions. On this issue, Cole claims that Dr. Travis's

opinion was that the etiology of the ruptured disc was "undetermined" and if properly classified Dr. Travis actually lacked any opinion as to the cause of the injury. As to Dr. Ballard, Cole calls her conclusion "ridiculous" and "pure speculation" in that she testified that she saw no evidence that the ruptured disc was caused by the therapy but rather believed Cole may have suffered the disc injury before he started therapy. Cole argues that all credible medical testimony, including that of Doctors Bean, Tibbs and Rayes, as well as the MRI and Cole's own statement as to when the pain first occurred, support his claim that the low back injury is work related. When treatment for a work injury causes a further or a new injury, then that additional injury becomes part of the initial injury and the employer and carrier are liable for it. Elizabethtown Sportswear v. Stice, Ky.App., 720 S.W.2d 732 (1986). In Dealers Transport Co. v. Thompson, Ky.App., 593 S.W.2d 84 (1979), another panel of this Court held that a work-related aggravation or exacerbation, even of a non-work-related condition is itself a work injury.

However, we believe the Board thoroughly addressed this matter as it relates to issues of credibility and presentation of "substantial evidence." As such, we adopt that portion of the Board's opinion as follows:

We will address Cole's argument on the latter issue first, as it falls within the "substantial evidence" rubric and may be addressed summarily. Cole posits that the ALJ's dismissal of his claim for back injury was essentially based upon a negative finding. He submits that it was error for the ALJ to find in favor of STS on this issue because STS was unable to present any evidence that the back injury did not occur as testified to by Cole. In support of this argument, Cole spends a good deal of time analogizing the facts of his claim to those in Greathouse Co. v. Yenowine, Ky., 193 S.W.2d 758 (1946), which he cites as authority. Cole fails to address the fact, however, that Yenowine was expressly overruled in Lee v. International Harvester Co., Ky., 373 S.W.2d 418 (1963). The Lee court addressed the issue as follows:

> As a fact-finding agency, the [ALJ] is in the same position as a jury, and the same rules apply. The claimant, bearing the burden of proof, 'has the risk of not persuading an [ALJ] in his favor.' Columbus Mining Co. v. Childers, Ky., 265 S.W.2d 443, 445 (1954). Standing alone, unimpeached, unexplained, and unrebutted, his evidence may or may not be so persuasive that it would be clearly unreasonable for the [ALJ] not to be convinced by it. There are, therefore, some cases in which no evidence whatsoever is required in 'support' of a negative finding, and among them are those in which the claimant's evidence would justify a favorable finding but would not require one as a matter of law. In such instances, the [ALJ's] finding is conclusive whether it be for or against.

> There are three respects in which we find Greathouse Co. v. Yenowine, 302 Ky. 159, 193 S.W.2d 758 (1946), must be overruled. The first is its necessary implication that if the claimant produces evidence sufficient to support an award he creates perforce a rebuttable presumption and is entitled to a favorable finding in the absence of a rebuttal. The second is its erroneous statement that a negative finding is the equivalent of a peremptory instruction in an ordinary jury trial. The third is its conclusion that because the evidence was substantially undisputed the controlling facts were undisputed, thus making the factual issues a question of law. That the evidence in a case is not in conflict does not necessarily eliminate or settle the essential issues of fact.

Id. at 420.

The evidence concerning the cause of Cole's lumbar disc herniation and, more specifically, the occurrence of a back injury during his physical therapy session on March 7, 2001, was conflicting. Though clearly there is evidence in the record upon which the ALJ could have concluded that Cole injured his back on that occasion, that evidence is conflicting, and as a matter of law, therefore, not so overwhelming as to make the ALJ's contrary findings unreasonable. When the issue is one of credibility, this Board has no authority to second guess the fact-finder's decision. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Moreover, the fact-finder 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 v. Fox, Ky., 19 S.W.3d 88 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); Hall's Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Id. at 482. Factually, the ALJ simply found Cole's testimony lacked credibility in light of the totality of the circumstances. It was not improper for the ALJ to weigh against Cole's testimony the lack of documentation of a back injury in the physical therapy notes from March 7, 2001, and the positive indication in those notes that Cole was "very happy" with the stability in his knee. The therapist's notes on the date the injury is alleged give no indication that the session was terminated prematurely or otherwise out of the ordinary, and such reasonable inferences are exclusively within the discretion of the ALJ, as fact-finder, as a matter of law. See, Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

What is more, the ALJ was within her fact-finding authority to rely upon the expert opinions of Drs. Travis and Ballard concerning the mechanism of injury alleged to have produced Cole's lumbar disc herniation and the lack of a medically probable causal relationship between the petitioner's physical therapy on his knee and the back injury alleged. The ALJ acknowledged and considered the evidence in the record to the contrary, including the reports of Dr. Owen and Cole's treating physicians, Drs. Bean and Rayes. However, she was more persuaded by the evidence presented by STS, and the risk of non-persuasion was on Cole. Of course, the discretion to pick and choose among the evidence is reserved solely to the fact-finder. Caudill v. Maloney's Discount

> Stores, Ky., 560 S.W.2d 15 (1977); Codell Construction Co. v. Dixon, Ky., 478 S.W.2d 703 (1972); Republic Steel Corp v. Justice, Ky., 464 S.W.2d 267 (1971). This Board is without the authority to make its own findings of fact. Smyzer v. B. F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971); KRS 342.285. When there is a conflict in the evidence, it is for the ALJ to resolve that conflict. Millers Lane Concrete Co., Inc., v. Dennis, Ky.App., 559 S.W.2d 464 (1980).

The Board's scope of review is limited to whether the ALJ exceeded his power, abused his discretion, or issued an order that was clearly erroneous or not in conformity with statutory law. See KRS 342.285(2); Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609 (1995). In contrast to its authority to determine legal issues de novo, the Board may not substitute its judgment for that of the ALJ on factual issues that are supported by substantial evidence and thus not clearly erroneous. See Union Underwear Co., Inc. v. Scearce, Ky., 896 S.W.2d 7, 9 (1995); Jecker v. Plumbers' Local 107, Ky.App., 2 S.W.3d 107, 110 (1999). This Court's duty is to correct the Board only where it has overlooked or is construed controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992); Huff Contracting v. Stark, Ky.App., 12 S.W.3d 704, 706 (2000).

While another ALJ may have ruled differently based upon the same conflicting evidence, we cannot say the ALJ erred in that her findings were support by substantial evidence and thus, not clearly erroneous.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

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