

RENDERED: JULY 11, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-000107-WC

HENDERSON COUNTY SHERIFF'S DEPARTMENT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-98272

SHERRY EVANS; HONORABLE JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

LAMBERT, JUDGE: The Henderson County Sheriff's Office (Sheriff's Office)  
appeals from an order and award entered in favor of Sherry Evans (Sherry) by the

Administrative Law Judge (ALJ) and upheld by the Workers' Compensation Board (Board). After careful review, we affirm.

On August 31, 2004, Sherry was employed by the Sheriff's Office as a civil process server. She reported to work at the Henderson County Courthouse early that morning, but she does not recall what happened after she put her papers in order for delivery.

It is undisputed that Sherry was a victim of an assault by an unknown assailant. She suffered cracked bones on the left side of her face, a laceration on her upper lip, a black eye, and injuries to her neck and the back of her head. She was rendered unconscious, robbed, sexually assaulted, and believed to have been raped. She continues to have numbness in her gums and teeth on the upper left side, knots and lumps under the skin on her face and lip, and the left side of the back of her head constantly hurts. Sherry has been unable to return to work.

Sherry has been treated primarily by Dr. Lawrence Suess and counselors Charlene Greer, Suzanne Craig, and Juliette Jones. From March 9, 2005, to date, Sherry has met approximately fifty-seven times for counseling with either Ms. Craig or Ms. Jones. She has been diagnosed with post-traumatic stress disorder and dysthymia.

Sherry testified on her own behalf that she had no psychiatric symptoms prior to the attack but now lacks concentration, is restless, and has safety concerns. She suffers from frequent nightmares, heart palpitations, crying episodes, feelings of helplessness, depression, fright, sadness, lack of sexual

intimacy, feelings of powerlessness, and memory lapses. She stated that although she could physically do her old job, her psychological issues make it impossible. She testified that she always has her stun gun or other weapons nearby.

Dr. Suess testified that Sherry has a category IV impairment rating using the 5<sup>th</sup> Edition of the AMA Guides to permanent impairment. He also stated that she suffered an 85% permanent functional impairment to her whole body as defined by AMA Guidelines. Moreover, he opined that she cannot ever return to her former employment as a process server nor perform any employment that would require her to interact consistently with the public due to the unpredictability of her panic attacks. Dr. Suess stated that Sherry's future medical treatment costs, not including in-patient hospitalization, are predictably in a range of \$145,545 to \$181,932.

Sherry was also examined by independent medical evaluation (IME) physician Dr. David Shraberg. Dr. Shraberg rated her at 10% permanent functional impairment based on his finding that she had a Class II mild impairment as defined by the 2<sup>nd</sup> Edition of the AMA Guides. He examined her twice, once in June 2005 and once in September 2005, and she failed to attend a third exam. He opined that if Sherry could conquer her unresolved fears, perhaps she might be employable in alternate work. He declined, however, to make any statement as to Sherry's future psychiatric treatment needs.

Also admitted into evidence, over the Sheriff's Office's objection, was the vocational report of Dr. Edward Berla. In a May 26, 2006, vocational

economic assessment, Dr. Berla opined that Sherry had a loss of earning capacity of \$145,010.00 stated in terms of present value. Dr. Berla stated in the report that, based on the information he reviewed, it was his opinion that Sherry was 100% occupationally disabled.

On July 6, 2007, the ALJ rendered an opinion and award, ordering the Sheriff's Office to pay Sherry the sum of \$236.21 per week beginning November 12, 2004, and continuing thereafter for so long as she is disabled, together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation. The ALJ found that Dr. Suess' determination of 85% impairment was incorrect but that Sherry was in fact totally occupationally disabled. The ALJ opined that Sherry's past employment history was all service related and her psychiatric issues make interaction with people too difficult for her to return to that type of work. He based his findings more on Sherry's own assessment of her abilities than on the medical evaluations offered. He further awarded her continuing medical expenses based mostly on her own testimony and partly on the testimony of Dr. Suess. The Sheriff's Office filed a petition for reconsideration, which was subsequently overruled. They then appealed to the Workers' Compensation Board. The Board affirmed the order and award of the ALJ, and this appeal followed.

The burden of proof before the ALJ rested on Sherry. Since she was successful, the issue before us on appeal is whether there was substantial evidence of probative value to support the ALJ's conclusion. *Wolf Creek Collieries v.*

*Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Substantial evidence is defined as “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). As fact finder, the ALJ has sole authority to judge the weight, credibility, and substance of the evidence as well as to determine the inferences to be drawn from the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Where the evidence is conflicting, the ALJ alone determines what to believe or disbelieve, whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). So long as the ALJ's opinion is supported by any evidence of substance it cannot be said a different result is compelled. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Our role, as an appellate court, “is to correct the Board only where [we perceive] the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

The Sheriff's Office argues that the ALJ abused his discretion in finding that Sherry was totally occupationally disabled because of the lack of credible evidence to support that finding. More specifically, the Sheriff's Office contends that there were no “objective medical findings,” as defined in Kentucky Revised Statutes (KRS) 342.0011(33), to support the finding of total disability and

that the ALJ should have confirmed that Dr. Suess' opinion was reliable under the test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2768, 125 L.Ed.2d 469 (1983), because he had specifically found Dr. Seuss' impairment rating lacked credibility. We disagree.

We find that the Board effectively addressed the evidence regarding this argument in its opinion issued December 21, 2007. It stated that:

[a]s it applies to the *Daubert* argument . . . it should be pointed out that at no time did [the Sheriff's Office] object to the introduction of Dr. Suess' testimony and medical report on this ground, nor was it raised as a contested issue at the benefit review conference or its petition for reconsideration. To this extent, this issue is not preserved for review. Assuming arguendo that the issue was preserved, a review of Dr. Suess' medical report and testimony reflect that Dr. Suess is a Board Certified adult, child, and adolescent psychiatrist. The record further reflects that he obtained a complete history and he gave opinions based upon a reasonable degree of medical probability. Dr. Suess' medical report further reflects that he measured [Sherry's] credibility by having her complete an APGAR measurement of sincerity of effort. He moreover assessed [Sherry's] impairment by measuring: 1) the Veterans' Administration PTSD Disability Work Capacity Evaluation; 2) Social Security Disability Area of Functioning; and 3) American Medical Association Evaluation of Impairment Due to Mental and Behavioral Disorders.

“The subject of an expert's testimony must be ‘scientific . . . knowledge.’ The adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.” *See Daubert*, 506 U.S. at 589-590, 113 S.Ct. at 2795. As the Board clearly outlined, Dr. Suess' opinion was

“grounded in the methods and procedures of science” and was supported by “more than subjective belief.” As both gatekeeper and fact finder, it was within the ALJ’s discretion to question Dr. Suess’ specific impairment rating but to simultaneously accept other aspects of his medical opinion.

Dr. Shraberg’s own opinion stated that in the best circumstances, if Sherry could overcome her anger, she would be re-employable in an office setting where she would feel safe. However, he simultaneously opined that he doubted that Sherry would ever improve much and that her anger appeared so strong that he doubted this could be overcome. Dr. Suess’ opinion in turn specifically stated Sherry could never return to a job that required her to interact consistently with the public in an official way. Sherry herself additionally testified that she does not think she could return to work. “A claimant, like any lay witness, may not undertake to make a prognosis, but he may state facts concerning his condition and these facts may be of such a nature as to enable the Board to determine *the extent and duration of the disability even in the absence of medical testimony.*” See *Johnson v. Skilton Const. Corp.*, 467 S.W.2d 785, 788 (Ky. 1971), quoting *Yocum Creek Coal Co. v. Jones*, 214 S.W.2d 410, 412 (Ky. 1948)(emphasis added). Therefore, it is clear that substantial evidence exists to support the ALJ’s finding that Sherry is 100% occupationally disabled. Accordingly, this finding cannot be disturbed on appeal. KRS 342.285(3); see also *Francis*, at 644 (“The appellate courts cannot substitute their judgment for that of the Board as to the weight of the evidence on questions of fact.”).

The Sheriff's Office also argues that it was a gross deviation from Workers' Compensation regulations to admit the vocational report of Dr. Berla. We disagree. The ALJ has broad discretion in what evidence he accepts. The record reflects that the report was submitted four days prior to the hearing, and at no time did the Sheriff's Office request leave to reopen proof time to either cross-examine Dr. Berla or take vocational testimony of its own. Therefore, we do not find that the ALJ abused his discretion. In the alternative, however, the opinions of Dr. Suess and Dr. Shraberg along with the testimony of Sherry were sufficient to support the ALJ's order and award. Therefore, in light of the totality of the circumstances, we find that any error that may have resulted from the acceptance of Dr. Berla's report into evidence was harmless.

Accordingly, we affirm the award and order of the ALJ and the subsequent opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Christopher Hopgood  
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BRIEF FOR APPELLEES:

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