

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
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DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000644-WC

BRITTHAVEN OF BENTON

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-002299-WC
WORKERS' COMPENSATION NO. 07-91020

VICKI SMITH;
HONORABLE LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Britthaven of Benton, appeals from a decision of the Court of Appeals which affirmed the award of permanent total disability benefits given to Appellee, Vicki Smith. Britthaven makes the following arguments on appeal:

1) that the Administrative Law Judge's ("ALJ") finding that Smith was totally disabled was not supported by substantial evidence; 2) that the ALJ disregarded undisputed medical evidence; and 3) that the Workers' Compensation Board abused its discretion by *sua sponte* remanding Smith's claim for a determination regarding the time period she was to receive temporary total disability ("TTD") benefits. For the reasons set forth below, we affirm the Court of Appeals.

Smith suffered a work-related injury when she slipped and fell on a wet floor at Britthaven. As a result of the fall, she suffered an injury to her neck, left shoulder, left anterior chest wall, left upper arm, left elbow, and left wrist. Smith was treated by Dr. Rex Arendall who performed a cervical fusion surgery. However, Smith testified that the surgery did not alleviate her pain. She testified that she has trouble sitting or standing for long periods of time, can only drive short distances, does not sleep well, cannot lift items with her left arm without experiencing pain, and cannot bend over without experiencing dizziness and headaches.

Smith filed a workers' compensation claim. Britthaven conceded that Smith suffered a work-related injury, but contested the amount of compensation owed. After a formal hearing, the ALJ made the following findings, which are pertinent to this appeal:

1. What is the extent and duration of [Smith's] physical work injury?

[Smith] argues that she has sustained a 28% whole person impairment and no longer retains the capacity to return to her pre-injury employment. [Britthaven] argues that [Smith] has sustained a 26% whole person impairment and that she does retain the capacity to return to her pre-injury employment.

...

The ALJ is presented with the opinions of two highly trained and well-respected surgeons. Having considered the record, I am more persuaded by the opinion of Dr. Arendall, [Smith's] treating surgeon, as to the extent of [her] impairment. I therefore find that she had sustained a 28% whole person impairment.

Dr. Arendall has recommended extensive restrictions on [Smith's] abilities. He also seems to have reservations about [Smith's] ability to return to her pre-injury work, specifically his indication that [Smith] 'could try.'

[Smith] further argues that as a result of the [work-related] injury, she is permanently and totally disabled. [Britthaven] argues otherwise. KRS 342.0011(11)(c) defines 'permanent total

disability' 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 the result of an injury.

In *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000) the Court stated:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c) and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson*, 432 S.W.2d 800, [sic] it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. *A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities.* The definition of 'work' clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See *Osborne v. Johnson*, [432 S.W.2d at 803].

The ALJ notes that [Smith] has undergone a three level cervical fusion and has testified that she endures continuing pain and explosive headaches as a result. In addition, [Smith] is over the age of 50 with modest education. She has lifting restrictions that would preclude her from returning to any of the types of duties she has performed in the past. Accordingly, this ALJ considering the factors stated above, [sic] I am persuaded that [Smith] is totally and occupationally disabled. I find accordingly.

(emphasis in original). The ALJ additionally found that Smith was not entitled to additional TTD payments.

The Board affirmed the ALJ's determination that Smith was permanently and totally disabled, but *sua sponte* remanded the matter for further findings regarding the period of time in which Smith was entitled to TTD payments. The Court of Appeals affirmed, and this appeal followed.

I. THE ALJ's FINDING THAT SMITH WAS PERMANENTLY AND TOTALLY DISABLED IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Britthaven's first argument is that the ALJ's conclusion that Smith is entitled to permanent total disability benefits is not supported by substantial evidence. Specifically, Britthaven argues that the ALJ failed to consider Dr. Arendall's deposition testimony which it believes indicates the doctor changed his mind regarding Smith's ability to work. The ALJ found the Form 107 persuasive in finding that Smith was permanently and totally disabled. Dr. Arendall stated in his Form 107 that Smith has many physical restrictions and a decreased range of motion due to her injury, and would likely miss more than four days of work a month due to her impairments. However, after completing the Form 107, Dr. Arendall testified in his deposition that Smith "could try" to return to work.

An injured worker bears the burden of proof and risk of non-persuasion before the ALJ with regard to every element of the claim. *Roark v. Alva Coal Corp.*, 371 S.W.2d 856 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Because Smith received a favorable decision from the ALJ, it must be affirmed if supported by substantial evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). The ALJ has broad discretion to reject any testimony and believe or disbelieve various parts of the evidence,

regardless of whether it comes from the same witness or the same party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). The ALJ also has sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from it. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

Britthaven contends that Dr. Arendall's statement that Smith "could try" to return to work indicates that he changed his mind about her physical impairments and restrictions as listed on his Form 107. Britthaven therefore argues that the ALJ erred by relying on the Form 107 instead of the doctor's deposition testimony in making his decision. However, the ALJ's opinion made reference to Dr. Arendall's deposition testimony that Smith could try to return to work. Clearly, the ALJ considered Dr. Arendall's statement, and then relied on other evidence to determine that Smith is permanently and totally disabled. We do not believe that one comment made during a deposition that a person "could try" to return to work to be of such weight as to make contrary findings unreasonable. Because the ALJ's findings are supported by the Form 107 completed by Dr. Arendall, we cannot find that he made a clearly erroneous finding of fact. Further, based on the lifting restrictions that Dr. Arendall placed upon Smith, and her testimony regarding ongoing pain, we cannot say that the ALJ misapplied the factors provided in *Hamilton*, 34 S.W.3d at 51. The ALJ's findings and conclusions are supported by the record.

Smith asks that we remand this matter to the ALJ to award sanctions against Britthaven because their argument is based on whether the ALJ's

findings are supported by substantial evidence. See *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). We decline to do so.

II. THE ALJ DID NOT DISREGARD UNDISPUTED MEDICAL EVIDENCE

Britthaven next argues that the ALJ disregarded undisputed medical evidence by finding Smith's testimony regarding her current aches and pains to be credible. Again, Britthaven focuses on Dr. Arendall's deposition testimony that Smith "could try" to return to work, to imply that her medical condition has improved. However, this argument is a repeat of Britthaven's first argument which we have rejected. There is no need for further analysis.

III. THE BOARD DID NOT ABUSE ITS DISCRETION BY REMANDING THE CLAIM FOR A DETERMINATION REGARDING TTD BENEFITS

Finally, Britthaven argues that the Board abused its discretion by *sua sponte* remanding the matter for the ALJ to fully adjudicate the period of time in which Smith was entitled to TTD. While Smith's brief to this Court states that the remand will not change the award of TTD benefits by one cent, the Board is authorized to address issues pertaining to the calculation of a claimant's award *sua sponte*. See *George Humfleet Mobile Homes v. Christman*, 125 S.W.3d 288 (Ky. 2004); *Whittaker v. Reeder*, 30 S.W.3d 138 (Ky. 2000). As such, the Board's consideration of the issue was not error.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

All sitting. All concur.

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