Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 29, 2016

CLAIM NO. 201100860

CHARLES MULLINS PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

MILLSTONE CONSTRUCTION CO. and
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

ALVEY, Chairman. Charles Mullins ("Mullins") seeks review of the Opinion and Order rendered March 7, 2016, by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), finding he has not sustained a worsening of his July 26, 2010 work-related injury and therefore dismissing his claim for increased benefits. Mullins also appeals from the May 3, 2016 Order denying his petition for reconsideration.

On appeal, Mullins essentially argues a contrary result was compelled, and the ALJ's decision "is clearly erroneous on the basis of the reliable, probative and material evidence contained in the whole record; or the order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." We disagree and affirm because the ALJ's determination is supported by substantial evidence, is not arbitrary and capricious, and a contrary result is not compelled.

Mullins filed a Form 101 on June 9, 2011 alleging he sustained a low back injury while working for Millstone Construction Co. ("Millstone") in Letcher County, Kentucky, while lifting the end of a drip pipe. Mullins' Form 104 work history consisted of working as a construction laborer.

In a decision rendered January 20, 2012, Hon. John B. Coleman, Administrative Law Judge ("ALJ Coleman"), found Mullins sustained a work-related low back injury on July 26, 2010. ALJ Coleman awarded temporary total disability benefits, permanent partial disability benefits based upon an 11% impairment rating assessed by Dr. Rick Lyon (enhanced by the three-multiplier contained in KRS 342.730(1)(c)1), and medical benefits.

Millstone filed a motion to reopen on April 16, 2015 to assert a medical dispute concerning monthly drug screens by Millennium Laboratories requested by Kentucky Pain Physicians. Millstone also moved to join Millennium Laboratories and Kentucky Pain Physicians as parties to the claim. The medical dispute was assigned to Hon. Jane Rice Williams, Administrative Law Judge, for resolution. Millstone subsequently supplemented the medical dispute to include a determination regarding epidural steroid injections.

Mullins subsequently filed a motion to reopen alleging he had sustained a worsening of occupational disability, and is now totally disabled. In support of the motion to reopen, Mullins filed the May 28, 2015 affidavit of Dr. Chad Morgan, D.C., who stated as follows:

> 3) That after conducting an evaluation of the Plaintiff, Charles Mullins, it is my medical opinion that Mr. Mullins' medical condition has deteriorated relative to his workers' compensation injury and especially since the Opinion & Award which was rendered in this case by the Hon. John B. Coleman on January 20, 2012.
>
> 4) It is my opinion, consistent with his current evaluation, that his pain has increased, his restrictions have increased, and that his medical condition has significantly worsened which results in greater occupational disability. The Affiant believes that

> the Plaintiff is now permanently and totally disabled from any gainful employment.

The motions to reopen were sustained to the extent the parties were allowed to proceed on their respective issues. The claim was reassigned to the ALJ.

Mullins testified by deposition on October 5, 2015, and again at the hearing held November 16, 2015. He is a resident of Chavies, Kentucky. Mullins was born on February 4, 1973. He reported he is six feet, two inches tall and weighs three hundred and sixty pounds. He is a high school graduate with no college or vocational training. He testified his work history includes working as a welder's helper, machine operator, overhead crane operator, laborer, fence installer and headstone installer.

Mullins experienced low back pain while attempting to lift a drip which was welded onto a piece of pipe. He subsequently underwent a discectomy at L5-S1. His back condition initially improved after surgery, but later worsened. He continues to take multiple medications for his low back condition. He has not worked at any time since ALJ Coleman's decision was rendered. He was awarded Social Security disability benefits in April 2014.

Mullins testified he has had one epidural steroid injection which provided no relief. He has a TENS unit,

which he stopped using because it likewise provided no relief. He also had a trial of a spinal stimulator which did not help. He stated he cannot sit or stand as long as he could in 2012. He also stated the pain radiating down his right leg is worse now than in 2012.

The issues regarding monthly drug screens and epidural steroid injections are not subject to this appeal. Therefore, the evidence concerning those issues will not be discussed further.

In addition to Dr. Morgan's affidavit, Mullins filed the November 17, 2015 report of Dr. Arthur Hughes. Dr. Hughes examined Mullins at the request of his attorney. Dr. Hughes diagnosed Mullins as having low back pain and radiculopathy on the right. He noted Mullins was status post lumbar discectomy. He assessed a 13% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated Mullins has ongoing low back pain and symptoms, and has not reached maximum medical improvement ("MMI").

Millstone filed the September 28, 2015 report of Dr. Mark O. Gladstein who evaluated Mullins at its request. Dr. Gladstein noted at the time of the evaluation, Mullins was a "42 year-old obese Caucasian male". He diagnosed

chronic low back pain without evidence of true radiculopathy, morbid obesity, some evidence of symptom magnification, possible type II diabetes mellitus, hypertension and degenerative disk disease of the lumbar spine at L5-S1. He noted Mullins exhibited some evidence of symptom magnification. He disagreed with Dr. Morgan's opinion that Mullins could not be gainfully employed. He saw little difference when comparing objective testing.

Millstone also filed Dr. Gladstein's December 11, 2015 report. He agreed with the 11% impairment rating previously relied upon by ALJ Coleman. He additionally stated Mullins needs active rehabilitation, weight loss and exercise. He opined Mullins can return to work to a job where he can stand or sit.

Dr. Ralph Crystal performed a vocational evaluation at Millstone's request on December 8, 2015. He determined Mullins does not have a complete and permanent inability to work due to his work-related injury.

Millstone designated some of the evidence from the original claim before ALJ Coleman. Specifically, it designated the treatment records of Dr. Gregory Corradino, Mullins' treating neurosurgeon, for treatment from September 21, 2010 through February 10, 2011. Dr. Corradino diagnosed a disk bulge at L5-S1, status post

laminectomy/discectomy at L5-S1 at the right on October 8, 2010 and low back and right leg pain.

Millstone designated additional records from the original claim. The Functional Capacity Evaluation ("FCE") report from the Holston Medical Group performed March 15, 2011 indicated Mullins could return to most of his regular work duties except for frequent standing. In his report dated July 8, 2011, Dr. Jared Madden indicated Mullins had low back pain, and a lumbar disk disorder with myelopathy, for which he assessed a 27% impairment rating pursuant to the AMA Guides. The report from Mr. Rick Pounds stated Mullins could return to medium duty work with no standing or walking restrictions.

Finally, Millstone designated the October 27, 2011 report of Dr. Lyon from the record of the original claim. Dr. Lyon diagnosed an acute herniated disk at L5-S1, status post laminectomy and discectomy. He stated Mullins was at MMI as of March 22, 2011, and could return to work in accordance with the restrictions contained in the FCE. Dr. Lyon determined Mullins needed no additional treatment. He assessed an 11% impairment rating pursuant to the AMA Guides. Dr. Lyon specifically stated he disagreed with the impairment rating assessed by Dr. Madden.

A Benefit Review Conference was held prior to the hearing on November 16, 2015. The issues preserved for determination included physical capacity to perform regular work; permanent total disability; liability for medical benefits; and, worsening of condition.

In his decision rendered March 7, 2016, the ALJ determined the contested monthly drug screens and requested epidural steroid injections were not reasonable and necessary. He also determined Mullins did not sufficiently demonstrate he had sustained a worsening of condition due to his work injury, and the request for increased benefits was denied. Specifically, the ALJ found as follows:

> 7. The Plaintiff has failed to carry his burden of proof on re-opening that the Plaintiff has "suffered a change of disability as shown by objective medical evidence of worsening … of impairment due to a condition caused by the injury since the date of the award or order." KRS 342.125 (1) (d).
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> 8. In making that finding I rely on the medical opinion of Dr. Mark O. Gladstein, M.D., which I find to be persuasive for reasons set out in the foregoing "Analysis".
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> 9. Because I believe that the evidence compels the foregoing finding, I find the issues of (1) Benefits per KRS 342.730 and (2) Worsening condition to be moot.
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> 10. As to Plaintiff's claim that he no longer retains the physical capacity to

perform regular work, thus entitling him to an award of permanent total disability benefits, as previously noted he has failed to introduce compelling evidence of a change of condition, so I am therefore bound by Judge Coleman's previous Opinion, Award and Order, which did not find him to be permanently, totally disabled from all employment.

11. I find the treatment regimen of Kentucky Pain Physicians that requires a drug screen for the Plaintiff at each office visit to be medically unreasonable and unnecessary for the cure and relief of the Plaintiff's work-related injuries, and clearly not required by law except under certain stringent circumstances that are not present in this case.

12. In making this finding, I rely on the opinion of Dr. Paul Loubser to be persuasive and base my judgment in reliance on that opinion as supported by the plain language of 201 KAR 9:260, which I find to be the most persuasive evidence in the record and upon which I rely in rendering this opinion.

13. As to the issue of proposed ESI's, given the lack of information regarding Mullins' completion of any formal therapeutic interventions, as well as the imaging studies lacking any significant findings confirming any neurocompressive findings, accompanied by Mr. Mullins' testimony as to the ineffectiveness of previous ESI's, I can only conclude that the request for lumbar ESI's is not medically reasonable and necessary.

14. Given Mr. Mullins' history and the overall body of evidence concerning this issue, I do not find the request

> for lumbar ESI's for him to be medically reasonable or necessary. KRS 342.020.

Mullins filed a petition for reconsideration essentially re-arguing the merits of the case, and requesting the ALJ to reverse his determination regarding the alleged worsening of condition. The ALJ denied this petition in an order dated May 3, 2016, specifically finding as follows:

> Plaintiff's Petition for Reconsideration of this Administrative Law Judge's (ALJ') Opinion and Order dated March 7, 2016 simply reargues the merits in this matter and fails to identify any errors patently appearing on the face of the Opinion. The Plaintiff reargues that the undersigned should reconsider his decision due to the fact Dr. Madden stated that the Plaintiff's potential for additional rehabilitation and vocational retraining was severely limited, a proposition that had already been rejected by the Honorable ALJ John B. Coleman in the original Opinion, Award and Order in this matter and was therefore *res adjudicata*.
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> Furthermore, the Plaintiff reargues the merits by stating that Dr. Arthur Hughes assessed some restrictions. The Plaintiff correctly points out that Dr. Hughes, Plaintiff's own paid IME expert, concluded that the Plaintiff can return to work.
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> As such, the Plaintiff's Petition for Reconsideration fails to state a basis upon which relief can be granted. The Plaintiff's Petition for Reconsideration is essentially a

request for the ALJ to provide a different ruling, more in his favor. Reconsideration requests of this type are specifically prohibited by KRS 342.281. Wells v. Fargo, 714 S.W.2d 481 (Ky. 1986); Eaton-Axle Corp. v. Nalley, 688 S.W.2d 233 (Ky. 1985).

The Plaintiff argues that the ALJ should reconsider the restrictions placed upon the Plaintiff. The record contains numerous medical reports and vocational reports concluding that the Plaintiff can return to some type of work. As the overwhelming weight of the medical evidence consisting of the medical treatment records, medical opinions, and vocational opinions clearly establishing that the Plaintiff can return to work, my ruling as to that issue was supported by substantial evidence and the Plaintiff has failed to show error patently appearing on the face of the Opinion and Order of March 7, 2016 that would support his request.

I further note the limited scope of review provided by KRS 342.281. This ALJ is the exclusive finder of fact pursuant to KRS 341.285(1). Accordingly, the ALJ "has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." Bellarmine[sic] v. Black Equipment Co., 297 S.W.3d 858, 866 (Ky., App. 2009). This discretion includes "deciding who and what to believe and gives the ALJ the freedom 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 adversary parties" total proof." As noted above, the Plaintiff attempts to reargue the medical merits, which is

> not permitted in Kentucky at this stage.
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> The medical opinion evidence from Dr. Gladstein, Dr. Hughes, Mr. Rick Pounds, Mr. Ernie Dickerson, Dr. Ralph Crystal, Dr. Rick Lyon, etc. establish that the Plaintiff is not permanently and totally disabled. Defendant Employer's allegation of error patently appearing on the face of the Opinion, Award & Order is a disagreement with my interpretation of the medical evidence in the record, which is not within the scope of my review under the provisions of KRS 342.281. *Francis v. Glenmore Distilleries*, 718 S.W.2d 953 (Ky. App. 1986).
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> Moreover, I have no authority to reverse myself on the merits of the claim. Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky., 1971).

As the claimant in a workers' compensation proceeding, Mullins had the burden of proving each of the essential elements of his cause of action. In this instance, his burden was to prove his condition had worsened since the original decision rendered by ALJ Coleman on January 20, 2012. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Mullins was unsuccessful before the ALJ regarding this issue, the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App.

1984). Compelling evidence is defined as evidence 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).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The 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).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable 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 reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

Here, the ALJ set forth a clear review and understanding of the evidence. Mullins complains the ALJ's decision is not in conformity with the Kentucky Workers' Compensation Act, is arbitrary or capricious, and is an abuse and unwarranted exercise of discretion. Contrary to the assertions set forth in Mullin's brief, the ALJ clearly reviewed and summarized the evidence of record. While Mullins did in fact file the affidavit of Dr. Morgan, this does not compel a finding in his favor. It is noted Dr. Hughes did not establish Mullins sustained a worsening of condition since the date of the original decision. Dr. Gladstein found the condition had not worsened, and in fact determined he could return to gainful employment. This supports the ALJ's decision, and a contrary result is not compelled.

Mullins essentially requests this Board to re-weigh the evidence, and substitute its opinion for that of the ALJ which we cannot do. Whittaker v. Rowland, supra. It was the ALJ's prerogative to rely upon those portions of the evidence outlined in his decision. Mullins merely

points to conflicting evidence supporting a more favorable outcome, which is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., supra.

Mullins' assertion the ALJ's decision is arbitrary, capricious and not in compliance with the Kentucky Workers' Compensation Act is simply not borne out by the evidence. We note an ALJ is not required to provide a detailed summary of the evidence, nor include the minute detail of his reasoning in reaching his determination. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). In this instance, the ALJ demonstrated his awareness of the entirety of the evidence of record, and we believe he made it sufficiently clear to the parties the evidence he found to be most probative and upon which his determinations rested. Again, we find the ALJ committed no error, and his decision shall remain undisturbed.

Accordingly, the decision rendered March 7, 2016, and the order on reconsideration issued May 3, 2016, by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED.**

ALL CONCUR.

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