Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 28, 2014

CLAIM NO. 200985529

CLIFFORD ADKINS PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

TECO COAL CO. INC.
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Clifford Adkins ("Adkins") seeks review of the May 13, 2013, opinion, award, and order of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ) awarding income and medical benefits for a work-related hearing loss but dismissing his claim for a cumulative trauma low back injury manifesting and/or occurring on June 10, 2009.

Adkins also appeals from the July 3, 2013, order which, except for amending the award of permanent partial disability ("PPD") benefits for the work-related hearing loss, overruled his petition for reconsideration.

In Claim No. 200501950, Adkins alleged occupational hearing loss with the last date of exposure of October 10, 2005, while an employee of Teco Coal Co., Inc. ("Teco"). In Claim No. 200600340, Adkins alleged cumulative trauma injuries to his spine and limbs manifesting on October 9, 2005. In a January 18, 2007, opinion, award, and order, Hon. John Coleman, Administrative Law Judge ("ALJ Coleman") dismissed Adkins' claim for cumulative trauma injuries to his spine and limbs. ALJ Coleman concluded Adkins had a work-related hearing loss but because the impairment rating did not meet the threshold established in KRS 342.730(5), the claim for income benefits was dismissed but medical expenses were awarded pursuant to KRS 342.020.

On September 23, 2009, Adkins filed a Form 101, Claim No. 200985529, alleging on June 10, 2009, he was injured when the ATV he was operating became stuck in the mud and as a result he was thrown onto his left side. Adkins alleged a repetitive stress injury stating "[he] suffered numerous mini-traumas through the years to his

spine and limbs as a result of his heavy labors as a coal miner." The body parts injured were his "spine and limbs."

On October 6, 2009, Adkins filed a Form 103, Claim No. 200901129, alleging an occupational hearing loss which he became aware of on September 23, 2009. Attached to the Form 103 was Dr. Robert Manning's September 22, 2009, letter stating that pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Adkins has a 16% impairment rating due to his hearing loss. On December 7, 2009, Adkins moved to reopen his previous hearing loss claim asserting the medical report of Dr. Manning showed his hearing loss had worsened and therefore he had an increase in his occupational disability. In a February 19, 2010, order, Hon. R. Scott Borders, Acting Chief Administrative Law Judge ("ACALJ"), concluded Adkins made a *prima facie* case for reopening and sustained the motion to reopen indicating the claim would be assigned to an ALJ for further adjudication. The claims were initially assigned to Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ Clark") who ordered all claims consolidated and all pleadings to be filed using Claim No. 200985529. On July 16, 2012, the claim was reassigned to the ALJ.

Adkins' January 5, 2010, and September 24, 2012, depositions were introduced and he testified at the March 15, 2013, hearing. Adkins worked for Teco from January 2001 until he was injured in 2009. The entire time he worked for Teco, he worked as a section foreman in underground mines. On June 10, 2009, the ATV he was driving got stuck in the mud. He got off the ATV and was pushing it when "it jumped and threw [him] to the left side" and onto the ground. He immediately experienced pain in the left side of his lower back. Although he finished his shift, he did not work anymore that day. Adkins explained he was in "real bad pain" the next day. His family physician, Dr. Trivette, prescribed physical therapy and Lortab, and ordered an MRI. Sometime thereafter, except for Ibuprofen, Adkins ceased taking any medication for pain. When Dr. Trivette released him to return to work, the mine at which he was working had shut down and he was unable to obtain work at any other mine. Adkins believes he is capable of performing light work but no longer can perform any heavy work or lifting. He has lower back pain and numbness in his right leg and foot. Adkins denied having any leg or back problems prior to the June 10, 2009, incident. He worked ten hours a day without pain. He occasionally experiences problems with his left

shoulder but when he does steroid treatments help. Adkins denied having any continued neck problems or pain.

In support of his injury claim, Adkins primarily relied upon the reports of Drs. James C. Owen and Robert Lowe. Teco relied upon the report of Dr. Michael Best generated as a result of an August 4, 2009, independent medical examination and functional capacity examination ("FCE"), and Dr. Best's October 24, 2009, and November 21, 2009, letters. Teco also introduced the March 21, 2011, deposition of Dr. Best.

Relying upon the report of Drs. Raleigh Jones and Jennifer B. Shinn, university evaluators, the ALJ found Adkins has a 12% impairment rating due to a work-related hearing loss which did not prevent him from returning to the job he was performing at the time he was injured. Concerning the alleged lumbar injury, the ALJ entered the following findings of fact and conclusions of law:

> **2. <u>Findings of fact and conclusions of law.</u>**
>
> The ALJ finds: (1) Plaintiff did not suffer an injury as defined by the act for cumulative trauma.
>
> **3. <u>Evidentiary basis and analysis</u>.**
>
> In so finding the ALJ relies on the absence of evidence of a work-related trauma causing degenerative changes to become disabling. The facts

> are that Plaintiff was off work for several months following his injury and that the mine was closed when he was released to return to work without restrictions. He drew unemployment benefits and looked for a job. While he has testified he would like to return to less physically demanding work, the ALJ has considered these facts along with the fact that his treating physician, Dr. Trivettt [sic], released him to return to work without restrictions.
>
> Also, Dr. Lowe classified the June 10, 2009 occurrence as a "sprain" and, while he found the incident to be "the straw that broke the camel's back," his report does not convince the ALJ of objective medical evidence of a harmful change as required by the statute.
>
> The ALJ relies on the report of Dr. Best who found nothing more than a temporary exacerbation and on his comments that Dr. Owen based his conclusion on subjective components when the objective portion of the examination was normal.

Adkins filed a petition for reconsideration requesting additional findings of fact. Specifically, Adkins requested a finding that Dr. Best's work history is incorrect. He also requested findings of fact in support of the ALJ's conclusion there was an absence of evidence of a work-related trauma causing the changes to become disabling, and for the ALJ to provide the pre-existing impairment rating for the lumbar spine. Adkins requested additional findings as to whether the work injury caused a

change of his active impairment symptoms and whether the impairment rating had changed since the injury. The ALJ was also requested to state whether Adkins sustained a specific injury to his back on June 10, 2009, and whether there had been a cumulative trauma to his cervical spine which caused him to have an injury to the cervical spine on that date. Additionally, findings as to the impairment rating for his cervical spine and left shoulder condition which were caused or brought about by cumulative trauma to both were sought. He also sought findings that the traumatic event aroused a pre-existing dormant degenerative condition of the lumbar spine and there were no objective medical studies or any other evidence of an active impairment prior to the work injury. Adkins noted the medical records were consistent with his testimony that he had no low back pain prior to the work injury and he consistently complained of chronic low back pain since the injury which was sufficient to qualify him for a 5% impairment rating. Adkins also requested recalculation of the hearing loss award. Finally, Adkins asserted since all physicians acknowledged the traumatic event of June 10, 2009, caused a previously dormant degenerative disease to become symptomatic and painful, he is entitled to future

medical care of his lumbar spine regardless of the existence of a permanent impairment rating.

On July 3, 2013, the ALJ entered the following order ruling on Adkins' petition for reconsideration:

> This matter comes before the Administrative Law Judge (ALJ) on Plaintiff's Petition for Reconsideration of many aspects of the Opinion, Award and Order dated May 13, 2013. After careful consideration and review, the ALJ does not change her reliance on the opinion of Dr. Best who found nothing more than a temporary exacerbation with no objective findings of a harmful change, these issues having been addressed in the Opinion. While Plaintiff believes the ALJ confused the claim of trauma to the cervical spine and left shoulder with a low back claim on June 10, 2009, the ALJ notes the form 101 for injury on that date is for injury to the "spine and limbs" all which have been thoroughly addressed in the Opinion. Dr. Best's October 24, 2009 letter to counsel for Defendant Employer specifically addresses the claims:
>
> > I am in receipt of your most recent correspondence. In that correspondence you asked that I discuss the new allegation of a "general cumulative trauma to his spine and limbs" and whether this is secondary to the work injury.
>
> After an article on degenerative disc disease, Dr. Best concluded:
>
> > …in my Independent Medical Evaluation of August 4, 2009,

> I indicated the patient to have a zero percent whole person impairment directly and causally related to the effects of the work event. I indicated that any and all impairment under *The Fifth Edition AMA Guides* was pre-existing. I indicated that there was absolutely no objective evidence that a harmful change occurred to the individual as a result of the work injury. The work event caused a temporary exacerbation of his long-standing, pre-existing degenerative disc disease that had returned to its pre-injury status at the time of our examination. Therefore, I continue to believe the patient has no (0% whole person) permanent impairment directly and causally related to the effects of the work event of June 10, 2009. There is certainly no long-term or permanent impairment scientifically or medically supported secondary to "cumulative trauma."

Dr. Best reviewed a MRI report of the lumbar spine on August 6, 2009 which revealed no evidence of disc herniation or nerve root entrapment, only pre-existing degenerative arthritis. He found subjective complaints far outweighed objective pathology.

As discussed in the Opinion, the ALJ carefully considered Plaintiff's argument that the work injury resulted in a claim for cumulative trauma and while Dr. Lowe classified the June 10, 2009 occurrence as "the straw that

> broke the camel's back," the ALJ did not find objective medical evidence of a harmful change as required by the statute.
>
> The ALJ has interpreted the medical evidence to indicate that while Plaintiff most likely has a bad back, she does not find the condition is due to harmful change from work, either cumulative or as the result of a single event. Furthermore, any arousal of symptoms from the single event was only temporary.
>
> Plaintiff correctly points out the error in the ALJ's calculation of the benefits for the work-related hearing loss which should be:
>
> 520.72 (max) x 12% x 1 x 1 = 62.49 per week
>
> **WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED**, the Petition for Reconsideration is **OVERRULED** except for the benefit calculation which is **SUSTAINED** and the Opinion is **AMENDED** to reflect the change.

On appeal, Adkins argues the ALJ erred in dismissing his low back claim since there is no medical evidence to support Dr. Best's opinion that Adkins' "current condition is the result of a pre-existing active low back condition." Adkins relies upon McNutt Constr./First Gen. Servs. v. Scott, 40 S.W.3d 854 (Ky. 2001) and Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007), in contending substantial evidence does not support dismissal of his low back claim as there is no

evidence he had an active low back condition prior to the work injury. Similarly, there is no evidence he returned to his pre-injury physical status. Adkins notes the ALJ denied his request for additional findings of fact concerning the impairment rating attributable to his lumbar condition immediately prior to the injury. Adkins posits since the ALJ dismissed his claim as a result of a pre-existing active condition, he is entitled to know the medical evidence upon which the ALJ relied as a basis for the conclusion he had a pre-existing active condition in his lower back.

Adkins notes in the order ruling on his petition for reconsideration, the ALJ admitted he has a bad back and that Dr. Best admitted he did not have any medical records which contradicted Adkins' history of having no lower back problems prior to the work injury. Therefore, Adkins argues in order for the ALJ to dismiss his low back claim, she would have to find his "low back pain had returned to a completely dormant state," which clearly has not occurred as he is still being treated for back pain.

Alternatively, Adkins asserts should the Board determine he is not entitled to an award of income benefits, the ALJ erred in dismissing his claim for medical benefits. He contends that all the physicians acknowledged

a traumatic event occurred on June 10, 2009, which caused his previous dormant degenerative disc disease to become symptomatic and painful. Irrespective of the fact the ALJ found Adkins did not have a permanent impairment as a result of the low back injury, he still suffers from an injury that continues to flare up and cause pain. Therefore, at a minimum, he is entitled to an award of future medical benefits.

As the claimant in a workers' compensation proceeding, Adkins had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Adkins was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that 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 Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be

disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

During his March 31, 2011, deposition, Dr. Best testified Adkins provided inconsistent and submaximal efforts during his FCE. Dr. Best diagnosed a soft tissue musculoligamentus strain which had resolved. He believed Adkins had a 5% impairment rating due to degenerative disc disease which was present before the work injury. He expressed the opinion that based on the MRI findings, there was no acute harmful change due to the work injury and Adkins' pre-existing 5% impairment rating did not change after the injury. As a result, there was no impairment due to the alleged cumulative trauma injury and Adkins had no permanent restrictions. Although the findings on MRI and x-ray placed Adkins within a DRE category, Dr. Best would have placed him within that DRE category before the accident.[1] Dr. Best testified complaints of pain are not necessary in order to be placed in the DRE category. He noted only subjective complaints of pain were present and there is no evidence the June 10, 2009, accident aggravated the underlying disc disease. Further, there is no radiological evidence indicating "a new or acute process

[1] Dr. Best's August 4, 2009, report reveals he placed Adkins within lumbosacral DRE category II.

occurred" or that "there was a worsening of the degenerative change." Dr. Best believed the accident did not aggravate the degenerative disc disease in Adkins' back. Rather, there was a temporary exacerbation with "no objective basis to indicate a permanent change occurred." He emphasized he did not believe Adkins was honest in his efforts during the FCE. Further, he believed Adkins was not truthful during the examination. He explained Adkins' only problem was in the lumbar spine.

Consistent with his deposition testimony, Dr. Best's August 4, 2009, report reflects a diagnosis of musculoligamentus lumbosacral strain which resolved. He stated Adkins described an injury which may well have caused a soft tissue ligamentus strain which had resolved and there was no long-term or permanent sequalae. Dr. Best believed Adkins' prognosis is excellent as there is no disc herniation, no nerve root impingement, and no vertebral fracture. Thus, Adkins had a condition which results in no long-lasting side effects. Although Dr. Best indicated Adkins did not have an active impairment prior to the injury and had a 5% to 8% pre-existing impairment rating, he explained further:

> While the patient does meet criteria for a Lumbosacral Category II, this pathology is preexisting. There is <u>no</u>

> objective evidence that a harmful change occurred directly and causally related to the June 10, 2009, injury. He had a soft tissue injury superimposed upon long-standing degenerative arthritis. This does result in pain, but this does resolve without permanent sequelae. Therefore, the patient shows no objective [sic] for a permanent impairment directly and causally related to the June 10, 2009, slip and fall.
>
> Using The Fifth Edition AMA Guides, the patient's permanent whole body impairment is 0%.

Dr. Best recommended a transitional return to work with Adkins initially lifting in the light to medium duty work category with a maximum lifting limit of thirty-five pounds for two weeks. Thereafter he could lift without restrictions. Dr. Best stated Adkins required absolutely no additional form of medical care or treatment which included pain management, narcotic analgesics, and no additional physical therapy or rehabilitation.

Contrary to Adkins' assertions, the testimony of Dr. Best recited above and the opinions expressed in his August 4, 2009, report constitute substantial evidence upon which the ALJ was free to rely in dismissing that portion of Adkins' claim for permanent income benefits and future medical benefits for the alleged low back injury. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky. App. 1940)

(citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939). This holds true regardless of whether Adkins sustained a single trauma injury or cumulative trauma injury. Dr. Best repeatedly emphasized his belief Adkins experienced a temporary injury which ultimately resolved. Moreover, in line with Robertson, we believe the ALJ could reasonably conclude from Dr. Best's testimony and his report that the injury of June 10, 2009, produced only temporary harmful changes involving Adkins' low back that were transient in duration, and that fully resolved returning Adkins to a pre-injury baseline state of health, resulting in no permanent impairment or disability or the need for future medical treatment. Dr. Best unequivocally stated that after a short transitional period, Adkins could return to his regular work and needed no further medical treatment as a result of the transient injury.

While Adkins is correct his testimony and the medical evidence he introduced could have been relied on by the ALJ to support a different outcome in his favor, in light of the remaining record, Adkins' testimony and his medical evidence represents nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W. 3d 554 (Ky. 2003).

During his deposition Dr. Best refused to give any credence to Adkins' testimony he had no lower back symptoms which pre-existed the June 10, 2009, injury. He noted Adkins provided inconsistent and submaximal efforts during the FCE. Thus, he believed Adkins was not being truthful during the examination. The ALJ determines the credibility of the witnesses and is permitted to rely on Dr. Best's opinions and disregard Adkins' testimony as not credible. In the order ruling on Adkins' petition for reconsideration, the ALJ stated she had relied upon the opinions of Dr. Best who found nothing more than a temporary exacerbation with no objective findings of a harmful change. The order fully explained the basis for her decision. Even though Adkins requested additional findings of fact in his petition for reconsideration, we believe the ALJ's order addressed Adkins' petition for reconsideration and her May 13, 2013, opinion and her July 3, 2013, order sufficiently supplied the basis for her decision in the case *sub judice*.

Further, since the ALJ found the work-related injury did not merit an impairment rating, she had no reason to determine the extent of his pre-existing impairment. The ALJ relied upon Dr. Best's opinion that Adkins experienced nothing more than a temporary

exacerbation and his lumbar condition returned to its pre-injury status. Therefore, no additional findings were required. Consequently, we find no error.

Because the outcome selected by the ALJ is supported by the record and the record does not compel a contrary result, we are without authority to disturb that portion of her decision finding Adkins is not entitled to permanent income benefits and future medical benefits for his low back injury. Special Fund v. Francis, supra.

That said, in the opinion, award, and order the ALJ did not order Adkins' claim for a low back injury dismissed. Further, based on the following finding Adkins is entitled to income and medical benefits for the period he experienced a temporary exacerbation of his pre-existing condition:

> The ALJ relies on the report of Dr. Best who found nothing more than a temporary exacerbation and on his comments that Dr. Owen based his conclusion on subjective components when the objective portion of the examination was normal.

In his report, as a result of the June 20, 2009, work injury, Dr. Best diagnosed a musculoligamentous lumbosacral strain which had resolved. Therefore, as a matter of law Adkins sustained a work-related injury and is entitled to the appropriate award of income and medical

benefits during the period his musculoligamentous lumbosacral strain was debilitating. We also note that in his report Dr. Best indicated Adkins should "return to a transitional return-to-work program" lifting in the light to medium duty work category with a maximum lifting of thirty-five pounds for two weeks. The report of Dr. Best establishes Adkins sustained a work-related injury as defined by the statute and applicable case law.

In addition, in her July 3, 2013, order ruling on Adkins' petition for reconsideration, the ALJ stated as follows: "[f]urthermore, any arousal of symptoms from the single event was only temporary." That statement constitutes a finding by the ALJ that Adkins sustained a temporary injury. Consequently, an award of income and medical benefits during the period Adkins suffered from a temporary injury is mandated. We express no opinion as to the duration of Adkins' entitlement to income and medical benefits.

Accordingly, those portions of the May 13, 2013, opinion, award, and order and the July 3, 2013, order ruling on the petition for reconsideration relating to the determination Adkins is not entitled to permanent income benefits and future medical benefits is **AFFIRMED**. That portion of the opinion, award and order failing to award

the appropriate TTD and medical benefits is **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and award containing additional findings of fact as to the duration of Adkins' temporary work injury, and any award of TTD benefits and medical benefits to which Adkins may be entitled during this period. Further, the award shall affirmatively state Adkins' claim for permanent income and medical benefits is dismissed.

ALL CONCUR.

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