

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 29, 2014

CLAIM NO. 201272285

DANNY PRATHER

PETITIONER

VS. APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

SIMPLEX GRINNELL
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Daniel Prather ("Prather") appeals from the April 22, 2014, Opinion and Award and the May 30, 2014, order overruling Prather's petition for reconsideration by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). In the April 22, 2014, Opinion and Award, the ALJ awarded temporary total disability ("TTD") benefits,

permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, Prather seeks remand for additional findings and reconsideration concerning the ALJ's reliance upon Dr. Ronald Burgess' opinions and impairment rating as opposed to Dr. Frank Burke's.

The Form 101 alleges Prather injured his left wrist on August 26, 2012, in the following manner: "We were emptying CO2 tanks at Toyota, the tank we were working on did not operate properly (valve frozen), when tank released [sic] hose, [sic] hit my wrist and fractured it."

The February 11, 2014, Benefit Review Conference ("BRC") order reflects the parties stipulated an injury occurred on August 26, 2012. Under contested issues is the following: benefits per KRS 342.730 and KRS 342.165.

In the April 22, 2014, Opinion and Award, the ALJ provided the following findings in the "Discussion and Determinations" section:

An employee has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his workers' compensation claim. *Snawder v. Stice*, 576 SW2d 276 (Ky. App., 1979).

When medical evidence is conflicting, the question of which evidence to believe is within the exclusive

province of the ALJ. *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky., 1993).

An ALJ, as fact finder, has the sole discretion to determine the quality, character and substance of the evidence and to draw reasonable inferences from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky., 1985).

The ALJ has the sole authority to judge the weight to be afforded the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corporation*, 514 S.W.2d 46 (Ky., 1974).

It is the ALJ's function to translate the lay and medical evidence into a finding of occupational disability. *Commonwealth Transportation Cabinet v Guffey*, 42 S.W.3d 618 (Ky., 2001)

In this claim two medical experts have given impairment ratings, Dr. Burke initially assessed a 18% WPI, but under cross examination, felt compelled to correct his assessment of Plaintiff's sensory defect. He reduced the percentage down from 7% to 2%, which reduced Plaintiff's WPI from 18% to 14%, and resulted in Plaintiff having a 14% WPI.

The other available impairment rating is the 2% WPI provided by Dr. Burgess.

A determination must be made as to which rating most accurately reflects Plaintiff's impairment, and in turn the extent of his occupational disability. It is determined Dr. Burgess' 2% most accurately reflects Plaintiff's left wrist impairment. For several reasons Dr. Burke's impairment rating is problematic. These problems include, Dr. Burke's [sic] having to correct his ratings when cross-examined by opposing

counsel. Obviously Dr. Burke's process is not problem free.

There is also the problem of when Dr. Burke did his evaluation. His evaluation was done less than a year after Plaintiff's surgery but as required by the AMA Guides, evaluations, particularly those involving strength testing, should not be performed until at least a year after the surgery. Dr. Burke also testified that an important piece of information to consider when performing an evaluation was to know the exact mechanics of the injury process, Dr. Burke was mistaken about the exact mechanics of Plaintiff's injury.

Dr. Burgess' impairment rating is the most accurate available rating, and therefore, it is determined Plaintiff sustained a 2% WPI as a result of his August 26, 2012 left wrist work injury.

Having determined Plaintiff has a whole person impairment, it is next appropriate to ascertain whether he is entitled to a multiplier under KRS 342.730. Based upon the determinations made in the FCE, and Dr. Burgess' acknowledged agreement with those determinations, it is determined Plaintiff does not retain the capacity to perform the work he was doing when injured. Plaintiff is entitled to the three (3X) multiplier provided under KRS 342.730 (1) (c) 1.

But for Dr. Burgess' date of July 25, 2013, the proof as to when Plaintiff attained MMI status from his work injury and subsequent medical treatment, is hazy, at best, [sic] Dr. Burke declined to specifically set an MMI date in his written letter, and his deposition testimony on this point was

not based on a solid foundation. For the above stated reasons, and the less-than-convincing nature of Dr. Burke's input on this point, it is determined Plaintiff attained MMI status on the date given by Dr. Burgess, being July 25, 2013.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id.

Kentucky law directs that when the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). There the court said:

The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court,

the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Wolf Creek Collieries at 736.

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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). For an unsuccessful claimant, this is a great hurdle to overcome. In Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky., 1986) the Supreme Court said:

If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A

finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

This Board cannot say that the evidence in the case *sub judice* compels remand for additional findings.

The July 25, 2013, Independent Medical Examination ("IME") report of Dr. Ronald Burgess was introduced into evidence. After examining Prather, Dr. Burgess set forth the following assessment:

This patient is felt to be at maximum medical improvement following open reduction and internal fixation of a Galeazzi fracture. His primary complaints of pain are over the site of the fracture dorsally, but there is no objective evidence of pathology requiring treatment in that location. He is not tender directly over the

volar aspect of the radius where the plate is and it is felt that hardware removal is not indicated. The patient does have instability of the distal radioulnar joint, which is a secondary complaint. I feel that this instability would give him trouble with repetitive forceful torque activities and would also limit his ability to lift, especially in the supinated position. I feel that the limitations as delineated in the Functional Capacity Evaluation would be appropriate. The patient would be a candidate for stabilization of the distal triangular fibrocartilage to the distal ulna. This would decrease the discomfort at the ulnar aspect of the wrist, which is not a major complaint at the present time and it is felt that this would not likely change his restrictions.

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition, Table 16-22, page 501, he is felt to have a mild joint subluxation, which can be reduced manually. Using Table 16-18, this is equal to 4% impairment of the upper extremity, which translates to 2% of the whole person.

The ALJ ultimately relied upon Dr. Burgess' opinions and 2% impairment rating.

In the April 22, 2014, Opinion and Award, the ALJ provided an explanation for the rejection of Dr. Burke's opinions and impairment rating. Additionally, we note that in the May 30, 2014, order overruling Prather's petition for reconsideration, the ALJ provided the following additional findings:

It should be noted that on page 13 of the Opinion, the reasons for determining Dr. Burgess' WPI rating of 2% was more accurate than Dr. Burke's 14% are set forth. As indicated there in [sic] the reasons include Dr. Burke's lack of knowledge as to the exact mechanisms of Plaintiff's work injury, a piece of information Dr. Burke acknowledged was important to know when ascertaining a claimant's WPI rating; it was also noted Dr. Burke's conclusions regarding Plaintiff's WPI were based upon a FCE performed too soon after Plaintiff's surgery; and, that on cross-examination of Dr. Burke by Defendant's counsel, during Dr. Burke's deposition, errors were pointed out as to how he arrived at his impairment rating, in fact he had to lower his rating from 18% to 14%. Obviously rejection of Dr. Burke's input was not based solely, though it was a considered factor, on whether the FCE upon which Dr. Burke relied was performed too soon after Plaintiff's surgery.

While there is nothing in the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") consistent with the ALJ's conclusion that Dr. Burke performed his examination too soon after Prather's surgery, this is not the sole reason cited by the ALJ for his rejection of Dr. Burke's opinions and impairment rating.

In the Opinion and Award, the ALJ stated three reasons for his disregard of Dr. Burke's opinions and

acceptance of Dr. Burgess' opinions. In addition to the fact the ALJ believed Dr. Burke's evaluation was done less than one year after Prather's surgery, the ALJ also disregarded Dr. Burke's opinions because he did not believe he had a correct understanding of the "exact mechanics of [Prather's] injury." Another factor was Dr. Burke corrected his impairment rating after being confronted with a mistake upon cross-examination. The ALJ could properly consider both of these facts in rejecting Dr. Burke's opinions and relying upon Dr. Burgess' opinions and impairment rating. The fact Dr. Burke corrected his impairment rating impeaches his credibility and the methodology used in assessing an impairment rating. As emphasized in his order ruling on the petition for reconsideration, the ALJ also believed Dr. Burke exhibited a lack of knowledge as to the "exact mechanisms" of the work injury. The ALJ went on to note Dr. Burke testified that understanding the nature of the injury was an important piece of information in the process of conducting his evaluation. Consequently, we believe an adequate basis was provided for the rejection of Dr. Burke's opinions and impairment rating.

Prather also maintains the ALJ observed his left wrist during the hearing and provided no explanation for ignoring his nerve injury as an additional rateable

component. The ALJ is not qualified to provide a diagnosis of a nerve injury. That determination must be made by the physicians. By his acceptance of Dr. Burgess' opinions, the ALJ chose to believe Dr. Burgess found no nerve damage caused by the injury and therefore provided no impairment for the alleged problem.

Prather is seeking to have this Board accept the fact he sustained nerve damage and remand for additional findings regarding this issue. We have no such authority. In the case *sub judice*, two physicians offered conflicting medical opinions as to the impairment rating attributable to the injury. The ALJ chose to accept the impairment rating assessed by Dr. Burgess, and his opinions constitute substantial evidence in support of the ALJ's determination regarding the extent of Prather's occupational disability. This Board has no authority to usurp the ALJ's discretion as to the physician he chooses to believe.

Prather hinges much of his appeal on only this one reason while virtually ignoring the other reasons articulated in both the April 22, 2014, Opinion and Award and the May 30, 2014, order overruling Prather's petition for reconsideration. In light of the other reasons expressed for the rejection of Dr. Burke's opinions, we find no reason to remand for additional findings. Because

the outcome selected by the ALJ is supported by substantial evidence in the record, we are without authority to disturb the decision on appeal. Special Fund v. Francis, supra.

Accordingly, the April 22, 2014, Opinion and Award and the May 30, 2014, order overruling Prather's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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