OPINION ENTERED: MAY 10, 2013

CLAIM NO. 201193486

DARIN FLAIRTY PETITIONER

VS. **APPEAL FROM HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE**

SMITH & JOLLY LANDSCAPING
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Darin Flairty ("Flairty"), *pro se*, appeals from the December 21, 2012 Opinion and Order rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"), dismissing his claim. The ALJ found Flairty failed to meet his burden of proving his knee condition was caused by an alleged work injury in the course of employment with Smith and Jolly Landscaping ("Smith & Jolly"). Flairty did not file a petition for reconsideration. Because the ALJ's

determination was supported by substantial evidence, and a contrary result is not compelled, we affirm.

Flairty filed a Form 101, Application for Resolution of Injury Claim, on February 13, 2012 alleging an injury to the cartilage and knee cap of his right knee on March 1, 2010 from pushing a wheelbarrow filled with dirt on a steep hill. The physical requirements of his job included pushing wheelbarrows, bending, squatting, lifting, shoveling, pulling, and climbing in and out of trucks.

Both Flairty and Smith & Jolly filed medical records from Dr. Michael O'Brien. In his office note dated September 30, 2010, Dr. O'Brien noted Flairty had experienced chronic right knee problems for several years. Flairty reported frequent squatting at work caused pain. Flairty did not recall any particular injury, but reported climbing stairs and twisting his knee bothered him. Dr. O'Brien diagnosed patellofemoral pain syndrome with patella compression.

Flairty completed a patient history form indicating he sustained a personal injury with no specific date of injury. He listed his symptoms as "recurring soreness in the knee especially when walking up steps constant wear from working in landscaping." He indicated he had similar

problems in the past which he described as “work-related soreness.”

On October 14, 2010, Flairty reported increased patellofemoral pain after falling three weeks earlier, landing on his proximal tibia. An MRI showed a contusion to the anterior tibia and chondromalacia of the patella with intact cartilage and meniscus. Dr. O'Brien prescribed physical therapy and a brace. He advised Flairty to avoid squatting. On June 30, 2011, Dr. O'Brien noted Flairty had improved with physical therapy, had been able to work, and was able to climb steps without pain. He released Flairty to return to full duty.

On February 9, 2012, Dr. O'Brien assigned a 2% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”) for patellofemoral pain syndrome. He noted Flairty's MRI was consistent with chondromalacia. Dr. O'Brien noted previous knee x-rays had been normal. Flairty advised he experienced discomfort with squatting, especially when he was at work which required him to squat “quite a bit.”

Dr. O’Brien’s records included a February 22, 2011 treatment note from Dr. John Bever who saw Flairty following a skiing accident ten days earlier when he had dislocated

his shoulder. Dr. Bever's record is silent regarding the knee condition.

On August 30, 2012, Dr. O'Brien responded to questions posed by Flairty as follows:

1. Most likely cause of chondromalacia is an anatomic predisposition. Trauma could be a factor. It could probably be exacerbated by overuse.

2. Chondromalacia is seen even in a young age group. However, it is characterized by degeneration of the articular cartilage which is going to increase as one ages.

3. I did not see arthritis, only chondromalacia of the patella.

4. Chondromalacia of the patella was probably the result of an anatomic predisposition which leads to tilting of the patella.

5. Tilting of the patella is caused from tightness in the lateral retinaculum or malalignment of the extensor mechanism.

6. Acute trauma could cause this immediately but anatomic malalignment would take years to develop into chondromalacia.

7. It is possible that landscaping could have exacerbated the symptoms.

8. It is possible that squatting, etc. could exacerbate chondromalacia but it is unlikely that it is the basic cause of it.

9. There is no history of injury that I know of.

10. The most likely cause is an anatomic predisposition or trauma.

Dr. Bart Olash performed a records review on June 30, 2011, and opined pushing the wheelbarrow in March 2010 might have aggravated pre-existing chronic knee pain, but he doubted it caused any permanent damage. Dr. Olash noted Flairty did not mention knee pain during an appointment one month after the injury. Dr. Olash noted physical therapy and quadriceps strengthening exercises must have produced very good results since Flairty was able to go skiing after therapy. Dr. Olash observed skiing produces greater pressure on the knee than pushing a wheelbarrow. Dr. Olash stated the medical records did not document a significant injury on March 1, 2010. Dr. Olash concluded Flairty had returned to his pre-injury status prior to going skiing.

Smith & Jolly submitted treatment records from Dr. Niva Kahn, Flairty's family physician, who saw him on April 12, 2010 and on June 28, 2010. Neither note referenced Flairty's knee condition. On September 28, 2010, Flairty complained of knee pain of one week's duration, and Dr. Kahn diagnosed right knee arthralgia. He noted Flairty had experienced ongoing pain for years which was worsened with climbing steps. Dr. Kahn noted landscaping required frequent bending. Although Flairty reported his knee

buckled at times, his examination was normal. Dr. Kahn advised Flairty to see an orthopedist and obtain an MRI.

Flairty's claim was submitted on the record without a hearing. On December 21, 2012, the ALJ made the following findings relevant to this appeal:

> As to the issue of causation, it is noted that plaintiff bears the burden of proof on this and every element of his claim. Quite simply, plaintiff has failed to carry his burden of proof. The expert opinion plaintiff submitted from Dr. O'Brien does not establish that plaintiff's knee condition is due to any work injury (or even to cumulative trauma) within a reasonable degree of medical probability as is necessary to pursue a claim for permanent benefits. KRS 342.0011(1). Indeed, Dr. O'Brien would only go so far as to say that plaintiff's knee condition "could" be contributed to by work activities. However, possibility does not rise to the level of probability. Because plaintiff has no proof that his knee condition was, within a reasonable degree of medical probability, caused by a work injury, he has failed to carry his burden of proof and his claim must be dismissed.

On appeal, Flairty argues the evidence compels a finding he sustained a cumulative trauma injury to his knee. He contends the ALJ, in assessing causation, did not give sufficient weight to the seventeen year work history involving repetitive bending and squatting. Flairty contends, within this context, Dr. O'Brien's statement the

chondromalacia "could probably be exacerbated by overuse" provides the expert opinion proving, within a reasonable degree of medical probability, the injury is work-related. Further, Flairty contends the improvement in his condition while he was off from work is evidence his condition is work-related. Finally, Flairty argues the ALJ erred in striking his brief in its entirety, thereby preventing him from making a fair and coherent argument based on the evidence.

Kentucky law holds 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). 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). As 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 party, as articulated by the Supreme Court in the case of Special Fund v. Francis, supra, this is a great hurdle to overcome:

> 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.

Id. at 643.

When the cause of a condition is not readily apparent to a lay person, medical testimony supporting causation is required. Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Co. v. Williams, 407 S.W.2d 396 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

Under the circumstances presented in this claim, it was necessary for Flairty to submit a medical opinion as to the existence and cause of his knee condition. As noted by the ALJ, Dr. O'Brien only indicated Flairty's work "could" have contributed to his knee problem. He did not state within reasonable medical probability Flairty's work was the cause of the knee condition. No physician opined Flairty sustained a cumulative trauma injury. Since no medical records were submitted indicating within reasonable medical probability Flairty sustained either a traumatic injury or a cumulative injury to the knee due to his work with Smith & Jolly, the ALJ correctly determined he failed to meet his burden of proof on the threshold issue of causation. The evidence clearly does not compel a finding in Flairty's favor.

Accordingly, the December 21, 2012 Opinion and Order of Hon. Grant S. Roark, Administrative Law Judge, dismissing Flairty's claim for failure to prove a work-related injury is **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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