Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 29, 2014

CLAIM NO. 201177608

EMPLOYMENT SOLUTIONS, INC. PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

DANNY FLETCHER
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Employment Solutions, Inc. ("Employment") appeals from the September 17, 2013, Opinion and Award of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") awarding Danny Fletcher ("Fletcher") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. On

appeal, Employment asserts the medical evidence compels a finding of pre-existing disability.

The Form 101 alleges on August 3, 2011, Fletcher injured his back in the following manner: "Pulling cable and the person in front of him was pulling faster causing him to jerk sideways and [sic] slipped and felt pain in back."

Fletcher introduced the April 30, 2012, Form 107-I completed by Dr. Robert K. Johnson. In the Form 107-I, under the heading "explanation of causal relationship," Dr. Johnson wrote as follows:

> Mr. Fletcher sustained a rupture of the C3-4 disc while doing extremely strenuous activities that were not familiar to him. His cauda equina syndrome developed later and was clearly made worse by the delay in surgical care.

In response to the question pertaining to whether Fletcher had an active impairment prior to August 3, 2011, Dr. Johnson checked "no" and further opined as follows: "Mr. Fletcher had a ratable impairment, theoretically, but it was not active and unrelated to this case."

The Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice, injury as defined by

the Act, exclusion for pre-existing disability/impairment, and TTD.

Concerning the issue of pre-existing disability, in the September 17, 2013, Opinion and Award, the ALJ determined as follows:

> 13. In order to be characterized as an active disability, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. *Finley v. DBM Technologies*, 217 SW3d 261 (2007).
>
> 14. The Defendant maintains the burden of proving the existence of a pre-existing condition. *Wolf Creek Collieries v. Crum*, 673 SW2d 735 (Ky. App. 1984).
>
> 15. The Defendant submits the reports of Drs. Zerga and Snider in this matter, both of whom assigned the Plaintiff an impairment rating as a result of the work injury.
>
> 16. The ALJ finds that the evidence submitted regarding pre-exisitng [sic] active impairment is insufficient to satisfy the Defendant's burden in that regard.
>
> 17. The ALJ further finds that the Plaintiff has established that the Plaintiff's injuries are causally work-related.
>
> No petition for reconsideration was filed.

While Kentucky law holds the arousal of a pre-existing dormant condition into disabling reality by a work

injury is compensable, an employer is not responsible for a pre-existing active condition present at the time of the alleged work-related event. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). The correct evidentiary standard regarding a carve-out for a pre-existing and active condition is articulated in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In Finley, supra, the Court of Appeals instructed that in order for a pre-existing condition to be characterized as active, it must be both symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. Finley v. DBM Technologies, supra. Since Employment is the party with the burden of proof on this issue and it was unsuccessful before the ALJ, the sole issue is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Further, in the absence of a petition for reconsideration, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's factual conclusions. *See* Eaton Axle Corp. v. Nally, 688 S.W.2d 334

(Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

We acknowledge the ALJ's findings concerning the issue of a pre-existing active condition are scant at best. In the seventeen-page Opinion and Award, the ALJ devoted five sentences to the issue of a pre-existing active condition, only three of which offer the parties and the Board anything of substance. Significantly, Employment did not request additional findings of fact or a more explicit ruling in a petition for reconsideration, as required by KRS 342.281 and KRS 342.285. As such, the issue of inadequate or incomplete findings of fact by the ALJ is not properly preserved for review by this Board. *See* Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007)(failure to make statutorily-required findings of fact is a patent error which must be requested in a petition for reconsideration in order to preserve further judicial review). Consequently, if the record contains substantial evidence in support of the ALJ's determination Fletcher "has established that the Plaintiff's injuries are causally work-related," the Board must affirm.

Dr. Johnson's above-cited opinions constitute substantial evidence which support the ALJ's determination Fletcher did not have an active impairment at the time of

the injury. Pursuant to Roberts Bros. Coal v. Robinson, 113 S.W.3d 181 (Ky. 2003), a finding of pre-existing impairment does not amount to a finding of pre-existing occupational disability. Thus, while Dr. Johnson opined that Fletcher, "theoretically," had pre-existing ratable impairment at the time of his injury, he also opined the impairment was not *active*.

In Roberts Bros. Coal Co. v. Robinson, supra, the Supreme Court explained:

> In other words, KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730 (1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

Id. at 183.

Therefore, the fact Fletcher may have had a pre-existing impairment, does not mean he had a pre-existing disability.

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).

Since the ALJ was entitled to rely upon Dr. Johnson's opinions, and Dr. Johnson's opinions comprise substantial evidence, the ALJ's ruling regarding pre-existing disability cannot be disturbed.

Accordingly, the ALJ's September 17, 2013, Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

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