OPINION ENTERED: November 30, 2012

CLAIM NO. 201091045

FARLEY BRASHEAR PETITIONER

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

AKEBONO BRAKE CORPORATION
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Farley Brashear ("Brashear") seeks review of the Opinion and Award rendered July 30, 2012 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related low back injury. Brashear also

appeals from the order on reconsideration entered August 20, 2012.

On appeal, Brashear argues the July 30, 2012 opinion and award was "unreasonable, arbitrary and capricious and is erroneous as a matter of law" when the ALJ failed to summarize or mention the medical opinion of Dr. Jules Barefoot. Brashear also argues it was a reversible error to adopt the impairment rating assigned by Dr. Gregory Nazar or Dr. Timothy Kriss because they both used the DRE method. Brashear argues the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), mandate the range of motion method be utilized when "there exists multi-level involvement in the same spinal region" and therefore Dr. Barefoot's opinion should have been adopted since he is the only physician who used the range of motion method in assigning a 21% permanent impairment rating. We affirm.

Brashear testified by deposition on March 16, 2012, and at the hearing held June 1, 2012. Brashear, a resident of Elizabethtown, Kentucky, was born on September 18, 1961 and is a high school graduate. Brashear testified he served in the Army from 1980 to 1991 as a material control forklift operator. He also worked as a host at a Las Vegas casino and trained to become a corrections

officer. Brashear later obtained a certification in group fitness and is a fitness trainer. Brashear testified he has been teaching fitness classes for approximately thirteen years.

Brashear testified he began working for Akebono Brake Corporation ("Akebono"), a brake manufacturing plant, in 1996. On March 3, 2010, Brashear was working as a machine line operator. He also had concurrent employment as a fitness group instructor at Energy, a sports facility, teaching classes three times per week.

As a machine operator, Brashear testified he was assigned to a machine line in the front disc department and also performed "change-overs." Brashear explained change-overs occurred when a machine line had to be switched to accommodate a different car model and required all the tools on the line to be changed. On March 3, 2010, Brashear was doing a particular change-over requiring him to climb atop a machine and reach down behind it to change out the tools. Brashear testified he felt a sharp pain in his lower back when he applied extra force to remove a stuck tool. Brashear was able to complete his shift and go home. However, his symptoms worsened and he sought medical treatment later that same night at Hardin Memorial Hospital emergency room. He received follow-up treatment at

WorkWell, which recommended physical therapy. Brashear testified physical therapy did not resolve his lower back condition. Brashear next treated with Dr. Stacie Grossfeld, who subsequently referred him to Dr. Nazar. Brashear testified he visited the emergency room at Hardin Memorial Hospital a second time due to his low back pain. Dr. Nazar performed low back surgery on April 13, 2010, and then recommended physical therapy. As a result of the surgery, Brashear was off work from March 31, 2010 through October 17, 2010. Brashear testified the surgery provided some relief. Brashear testified Dr. Nazar released him to work without restrictions and last treated him in July 2011.

When Brashear returned to work in October 2010, Akebono placed him in the drum brake component assembly as a packer on the night shift. Brashear testified his job as a packer was less physically demanding than as a machine operator. In January 2011, Akebono moved Brashear to delivery, which he testified is a very physically demanding job. After returning to Akebono, Brashear earned the same or greater wages than he did at the time of his work-related injury. Brashear continues to work in delivery at Akebono.

Following the low back surgery, Brashear testified he also returned to Energy as an exercise instructor for a short while, but later quit for reasons unrelated to his low

back injury. Brashear currently works at Elizabethtown Swim and Fitness as a fitness trainer teaching a one hour class, twice per week. The class involves weight lifting and various exercises, but he sometimes has to modify or not perform the exercises due to low back pain.

Brashear testified in his current condition, he could perform the job he had as a machine operator at the time of his work-related injury, with the exception of the "change-overs" because his back would be unsupported. He also testified he is able to perform his current job in delivery and needs no assistance from others. Brashear testified he had "a little back trouble" in 2009 for which an MRI was performed. He has had no other low back problems or treatment.

Brashear testified he currently experiences intermittent back pain, depending on how long he sits or stands. He also experiences numbness in his left leg, foot, and three toes. Brashear testified he has experienced the numbness symptoms since the day of the accident and the subsequent low back surgery did not relieve his numbness complaints. Brashear testified he has lost "some" range of motion in his low back, as well as some flexability due to the work-related injury. He also cannot sit, stand or ride in a vehicle for long periods of time. Brashear testified

he occasionally takes medication prescribed by Dr. Nazar for his back pain.

Michael Milby ("Milby"), a production manager for Akebono, testified at the hearing that he was Brashear's supervisor at the time of his work-related injury. Milby described the physical activities involved with a change-over.

Eddie Hobbs ("Hobbs"), a drum brake area manager for Akebono, also testified at the hearing. He currently supervises Brashear. Hobbs testified Brashear does not require any assistance to complete his job duties, does not appear to be in any anguish while working, and has never complained to him of back pain. He also testified Brashear's current job as a driver is more physically strenuous than the job he performed at the time he was injured on March 3, 2010.

Also at the hearing, counsel and the ALJ engaged in the following dialogue regarding the medical report of Dr. Barefoot:

> Judge Weatherby: Okay, we have reports from Dr. Brashear, Dr. Grossfeld, and Hardin Memorial and Norton Hospital, is that correct?
>
> Mr. Catlett: There should be a report from Barefoot – Dr. Barefoot.

> Judge Weatherby: I don't see that listed, but I will put it down.
>
> Mr. Catlett: I hope you have it in your file.
>
> Judge Weatherby: I do.
>
> Mr. Zanetti: And, we did receive that report from Barefoot as well.

A hearing order dated June 1, 2012, signed by all parties listed the following items filed by the plaintiff to be considered as evidence: Dr. Brashear; Dr. Grossfeld; Hardin Memorial Hospital, Norton and Dr. Barefoot.

Brashear filed a Form 101, Application for Resolution of Injury Claim, alleging he injured his lower back when he bent over at waist level to lift tools. Brashear attached the medical records of Dr. Stacie Grossfeld to his Form 101. On March 26, 2010, Brashear presented to Dr. Grossfeld with complaints of low back pain radiating down his right lower extremity resulting from the work incident. Dr. Grossfeld noted physical therapy and medication had provided no relief. Dr. Grossfeld diagnosed probable disc protrusion and ordered a lumbar spine MRI. Dr. Grossfeld prescribed medications, a TENS unit and a back brace. She also restricted Brashear to light duty work. On March 30, 2010, Dr. Grossfeld diagnosed an L2-L3 disc

herniation, restricted Brashear from work and referred him to a neurosurgeon.

Brashear also submitted the records from Hardin Memorial Hospital Emergency Room. Those records reflect on March 4, 2010, Brashear complained of sharp continuous low back pain occurring while working on a machine and he was diagnosed with an acute low back strain. An x-ray of the lumbar region was negative. Brashear was prescribed medication, restricted to light duty and referred to WorkWell. Brashear returned to the emergency room on March 23, 2010 complaining of worsening symptoms, including difficulty walking, and numbness and pain in his right leg.

Brashear filed the medical records from Dr. William King at WorkWell Occupational Health. On March 5, 2010, Dr. King noted continued complaints of pain over the right lateral low back region and diagnosed a muscular strain of the right low back region. He subsequently recommended physical therapy. On March 22, 2010, Dr. King noted Brashear continued to experience low back pain despite physical therapy and medication, and referred him to Dr. Grossfeld. Brashear also submitted physical therapy records from Hardin Memorial Hospital.

Reports of two MRIs of the lumbar spine taken at Elizabethtown Diagnostic Imaging were submitted into

evidence. A March 9, 2009 MRI revealed multilevel degenerative changes and congenital short pedicles producing mild central canal stenosis throughout lumbar spine; disc protrusion at L2-L3 and L5-S1 and mild bilateral foraminal stenosis at L4-5 and L5-S1. A March 29, 2010 MRI revealed developmentally narrow spinal canal, multilevel degenerative changes and "a huge disc protrusion or herniation at L2-3 is significantly larger in comparison to 6/9/2009, and focally obliterates the CSF space."

Brashear and Akebono submitted medical records of Dr. Gregory B. Nazar of Norton Neurological Specialists and Norton Audubon Hospital. On April 2, 2010, Dr. Nazar noted Brashear's treatment history, including the 2010 MRI and failed physical therapy. Dr. Nazar diagnosed lumbar disc herniation at L2-L3, secondary to work injury, and recommended surgery. He also kept Brashear off work and prescribed medication. The operative report dated April 13, 2010 indicated a diagnosis of large central, left paracentral disc herniation at L2-3 with compression of the thecal sac, descending and exiting L2 and L3 nerve roots. Dr. Nazar performed a 1) microlumbar laminotomy L2 with medical foraminotomy L2-3 for removal of foraminal extruded disc fragment and decompression of descending and exiting left L2 nerve root and 2) microlumbar laminotomy left L3

with medical foraminotomy L3-4, medial facetectomy, removal of lateral recess and central extruded disk fragments that decompressed the descending and exiting L3 nerve root and thecal sac. In several follow up notes, Dr. Nazar indicated the surgery was successful and noted Brashear had made excellent process. By August 11, 2010, Brashear rated his pain level at zero on a ten scale. On September 22, 2010, Dr. Nazar noted Brashear's neurological exam was normal and exhibited no signs of radiculopathy or myelopathy. Again on November 3, 2010, Dr. Nazar noted Brashear was pain free and was doing well at work on restricted duty. On February 9, 2011, Dr. Nazar noted Brashear had returned to work without restriction. He noted Brashear complained of no pain, required no medication, and continued to have normal neurological exams with no clinical signs of radiculopathy. He opined Brashear attained medical maximum improvement ("MMI") and released him from his care.

In a March 21, 2011 medical note, Dr. Nazar assigned a 10% impairment rating using the DRE method pursuant to the AMA Guides. He further noted:

> This reflects the fact that he has had previous surgery to repair a disc herniation. He is having no further back or radicular symptoms and thus has made a complete recovery from the surgical intervention. The impairment rating has been obtained from the AMA

> Guidelines 5th Edition, Table 15.3 on page 284 and essentially bases the fact that he has had pervious surgery performed.

Dr. Nazar recommended no permanent restrictions and opined Brashear's impairment was entirely related to his work injury.

Akebono submitted the medical report of Dr. Timothy Kriss, a neurosurgeon and spine specialist, dated June 27, 2011. Dr. Kriss noted current complaints of intermittent low back achiness and discomfort, as well as left foot numbness. He noted all radicular findings and almost all radicular complaints had been resolved with the April 2010 surgery. He further noted Brashear experienced no lower extremity pain and had no lumbar radiculopathy. He stated Brashear's neurological exam and function was normal. Dr. Kriss noted Brashear attained MMI on February 9, 2011, and he recommended no permanent restrictions. Dr. Kriss assigned an 11% impairment rating using the DRE method pursuant to the AMA Guides by stating as follows:

> In accordance with the [AMA Guides], page 384, table 15-3, DRE lumbar category III, for surgically treated radiculopathy and correlating herniated disk, I would assign a whole person impairment of 11%. . . .
>
> Alternatively, range of motion methodology could have been utilized because of the multilevel nature of the

> pathology and surgery, however, in a neurologically intact patient with normal range of motion, Mr. Brashear would have still ended up with the same 11% whole person lumbar impairment utilizing range of motion methodology (table 15-7, section 2E and 2F, page 404, Fifth Edition AMA Guidelines).

Brashear submitted the medical report of Dr. Jules J. Barefoot dated February 3, 2012. Dr. Barefoot noted complaints of intermittent low back pain and persistent left foot numbness. Dr. Barefoot assigned a 21% impairment rating utilizing the range of motion method pursuant to the AMA Guides. He cited page 398 of the AMA Guides which states "the Range of Motion Method should be used if multi-level involvement and/or alteration of motion segment integrity has occurred in the same spinal region." Therefore, Dr. Barefoot opined since there was multi-level involvement, the range of motion method was mandated by the AMA Guides. Dr. Barefoot also noted he disagreed with the impairments assigned by Drs. Nazar and Kriss by stating as follows:

> In reviewing Dr. Kriss's Independent Medical Examination, I must respectfully disagree with his conclusions concerning the impairment rating of 11% that he assigned. It is clear that the guides do mandate the Range of Motion Methodology for multi-level involvement in the same spinal region. Although Dr. Kriss does make note on page four of his

> report that Mr. Brashear does have an 11% impairment from values taken from page 404, table 15-7, he did fail to include impairments relating to range of motion.
>
> Likewise, I must respectfully disagree with Dr. Nazar's 10% impairment that he assigned on March 21, 2011. Once again, by the instructions in the guide, it is clear that the Range of Motion Methodology should be used and not the DRE methodology, as noted by Dr. Nazar.

Dr. Barefoot opined Brashear's impairment is related to the March 3, 2010 work injury. He further noted Brashear has attained MMI and recommended permanent work restrictions of no repetitive heavy lifting, carrying, bending, stooping, squatting and crawling. He also restricted Brashear from any work on ladders or scaffolds.

In the opinion and award rendered July 30, 2012, the ALJ summarized the evidence, including the medical records of Dr. Grossfeld, Dr. Nazar, Norton Audubon Hospital, Hardin Memorial Hospital and Dr. Kriss. However, the ALJ failed to summarize or mention the medical report of Dr. Barefoot. The ALJ stated as follows in awarding TTD benefits, PPD benefits and medical benefits for Brashear's low back work-related injury:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Average Weekly Wage and TTD

11. The wage records that have been admitted and it is otherwise undisputed that the Plaintiff's pre-injury weekly wage was $891.69.

12. The Plaintiff testified and the Defendant has also admitted to having knowledge that the Plaintiff earned a concurrent wage of $45.00 per week.

13. The ALJ therefore finds that the Plaintiff's average weekly wage is $936.69.

14. The parties stipulated that TTD benefits were paid at a rate of $567.32 per week from March 31, 2010 to October 17, 2010. Based upon the average weekly wage determination herein, the ALJ finds that TTD has been underpaid in amount and that the correct weekly amount should have been $624.46.

15. The Plaintiff has testified that he was off work from March 30th, 2010 until October 8th, 2010 and the ALJ therefore finds that TTD was overpaid in duration.

Benefits per KRS 342.730

16. Dr. Nazar has assessed a 10% whole person impairment and is especially credible because he is the Plaintiff's treating physician and is most familiar with his injury and treatment. It is also noted that Dr. Kriss assessed an almost identical 11% whole person impairment.

17. The ALJ therefore finds that the Plaintiff has a 10% whole person impairment.

18. The Plaintiff has credibly testified that he has returned to work

> and that his job is of a demanding nature. He has also indicated that he continues in his role as a personal trainer in addition to his job with the Defendant. His supervisor has likewise testified that the Plaintiff works 48 to 50 hours per week for the Defendant without apparent difficulty.
>
> 19. While the Plaintiff has indicated an apparent inability to perform the "change over" portion of his job, the ALJ does not find this to be credible based upon the Plaintiff's other vigorous activities as well as the determination of Dr. Nazar that the Plaintiff could return to work without restriction. The ALJ was also persuaded by Dr. Kriss' opinion that that[sic] other than the Plaintiff's well-healed incision, the Plaintiff's lumbar spine is normal.
>
> 20. The ALJ therefore finds that the Plaintiff retains the ability to perform the type of work being performed at the time of the injury.
>
> 21. It is undisputed that the Plaintiff returned to work at the same or greater wages and the ALJ further finds that due to his ability to maintain his current vigorous activity and work schedule, the Plaintiff is likely to continue in his current employment. No multiplier is therefore applicable.

In his petition for reconsideration, Brashear argued the ALJ made no mention of Dr. Barefoot's report in the opinion and award despite the fact it was submitted into evidence, was discussed at the hearing, and heavily relied

upon in his brief to the ALJ. Brashear also argued, as he does on appeal, Dr. Barefoot's opinion should be adopted because he utilized the proper methodology in assigning an impairment rating for his low back injury. Brashear noted the ALJ did not address which method of rating should be adopted in the opinion and award despite his arguments in his brief to the ALJ. Brashear requested the ALJ reconsider his July 30, 2012 opinion and award, adopt the opinion of Dr. Barefoot in its entirety, and assign a 21% impairment rating for his low back injury.

In the order on reconsideration dated August 20, 2012, the ALJ stated as follows:

> **ADDITIONAL FINDINGS AND CONCLUSIONS**
>
> 1. The report of Dr. Barefoot was initially and incorrectly listed as the report of Dr. Brashear and was inadvertently not summarized in the Opinion and Award herein. The Plaintiff did file a corrected form 107 to remedy the issue.
>
> 2. The ALJ considered and rejected the impairment rating offered by Dr. Barefoot in favor of that of the treating physician because the impairment rating offered by Dr. Barefoot was primarily based upon the range of motion method.
>
> 3. The ALJ finds that the impairment rating of the treating physician Dr. Nazar is more credible than that of Dr. Barefoot. Dr. Nazar found that the Plaintiff was having no further back or

> radicular symptoms which is consistent with the stated activities of the Plaintiff and contradicts the range of motion findings of Dr. Barefoot.
>
> 4. The Opinion and Award entered July 30, 2012 herein in all other respects shall remain as entered.

On appeal, Brashear argues the July 30, 2012 opinion and award was "unreasonable, arbitrary and capricious and is erroneous as a matter of law" because the ALJ did not mention Dr. Barefoot's medical report, did not address the fact Dr. Barefoot utilized the range of motion method when Drs. Kriss and Nazar employed the DRE method and failed to acknowledge the AMA Guides dictate the range of motion method be used in cases like Brashear's where there is multilevel involvement in the same spinal region. Brashear again argues Dr. Barefoot's assignment of impairment is the only one in conformity with the AMA Guides and therefore the opinions of Dr. Kriss and Dr. Nazar should have no persuasive value. In support of his argument, Brashear cites to several sections of the AMA Guides. Brashear also argues the ALJ's erred by finding Dr. Nazar more credible in the order on reconsideration in light of Brashear's testimony indicating he currently experiences left foot numbness.

As the claimant in a workers' compensation proceeding, Brashear had the burden of proving each of the essential elements of his cause of action, including permanent impairment. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where the claimant is unsuccessful with regard to that burden, 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority

to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). The ALJ, as fact-finder, 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 v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We first conclude the ALJ was fully aware of and gave due consideration to Dr. Barefoot's medical report. At the hearing held June 1, 2012, the ALJ confirmed he had

the report of Dr. Barefoot in his file. On the same day, a hearing order was signed by all parties and listed Dr. Barefoot, among others, under items filed by the plaintiff to be considered as evidence. Thereafter, the ALJ failed to summarize or mention Dr. Barefoot's report in the July 30, 2012 opinion and award. However, in the order on reconsideration, the ALJ recognized the medical report was inadvertently not summarized. He then made additional findings, stating he considered and rejected Dr. Barefoot's impairment rating in favor of Dr. Nazar and provided his reasoning in doing so. It is clear the ALJ considered and subsequently rejected Dr. Barefoot's opinion in favor of Brashear's treating physician, Dr. Nazar.

We also find no merit in Brashear's argument Drs. Nazar's and Kriss' opinions regarding permanent impairment have no probative value because they do not conform to the AMA Guides. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), the Kentucky Supreme Court explained the assessment of impairment ratings and the proper interpretation of the AMA Guides are medical questions solely within the province of medical experts. *See also* KRS 342.0011(11)(a), (35) and (36); and KRS 342.730(1)(b). For that reason, an ALJ is not authorized to arrive at an impairment rating by independently interpreting

the AMA Guides. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Rather, the proper interpretation of the AMA Guides and assessment of an impairment rating pursuant to the AMA Guides are medical questions reserved only to medical witnesses. Kentucky River Enterprises v. Elkins, supra. Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005). Therefore, while an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be accorded an expert's impairment assessment, as finder of fact, he is never required to do so. George Humfleet, supra. Moreover, authority to select an impairment rating assigned by an expert medical witness rests with the ALJ. *See* KRS 342.0011 (35) and (36); Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

In the case *sub judice*, three physicians provided opinions regarding the issue of permanent impairment. Dr. Nazar, Brashear's treating physician, assigned a 10% impairment rating using the DRE method. Dr. Kriss assigned an 11% impairment rating using the DRE method. He also noted the range of motion method could have been used, and opined Brashear still would ended up with an 11% impairment since he was neurologically intact with normal range of motion. Dr. Barefoot assigned a 21% impairment rating

utilizing the range of motion method. Although Dr. Barefoot criticized the use of the DRE method used by Drs. Kriss and Nazar, such an opinion would not necessarily be legally determinative or in any way binding. Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001); Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977).

In the opinion and award, the ALJ awarded PPD benefits based upon a 10% impairment assessed by Dr. Nazar. The ALJ specifically concluded Dr. Nazar was more credible since he is Brashear's treating physician and is most familiar with his injury and treatment. He also noted Dr. Kriss assessed an almost identical 11% impairment. In the order on reconsideration, the ALJ further stated he considered and rejected Dr. Barefoot's opinion regarding impairment and provided his reason for doing so. As was his prerogative, the ALJ relied upon Dr. Nazar's opinions and found them to be more credible than Dr. Barefoot. In doing so, he stated:

> Dr. Nazar found that the Plaintiff was having no further back or radicular symptoms which is consistent with the stated activities of the Plaintiff and contradicts the range of motion findings of Dr. Barefoot.

Although Dr. Barefoot disagreed with Drs. Nazar's and Kriss' use of the DRE method, the ALJ had the right to

reject that opinion. A review of the medical evidence reveals nothing more than conflicting evidence regarding the appropriate impairment rating. Since the ALJ has authority to pick and choose from the evidence, he was free to rely on Dr. Nazar's impairment rating as more credible and this Board is not authorized to disturb that choice on appeal. Special Fund v. Francis, supra.

Accordingly, the July 30, 2012 Opinion and Award rendered by ALJ Jonathan R. Weatherby, and the August 20, 2012 Order ruling on the petition for reconsideration are hereby **AFFIRMED.**

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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