# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: January 8, 2014**

CLAIM NO. 201298927

FREDERICK PERRY PETITIONER

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

MAYO RESOURCES/BOOTH ENERGY
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**AFFIRMING**

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

**RECHTER, Member.** Frederick Perry ("Perry") appeals from the March 22, 2013 Opinion, Award and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), and from the April 26, 2013 order denying his petition for reconsideration. The ALJ dismissed Perry's claim in its entirety upon finding Perry failed to prove he suffered a

harmful change or occurrence of an injury as defined by the Act. Perry argues the decision is not supported by substantial evidence, the evidence compels a finding of permanent total disability, the psychological condition is compensable, and he is entitled to medical benefits for his impairment. We disagree and affirm.

On December 22, 2011, Perry was employed by Mayo Resources/Booth Energy ("Mayo") as a rock truck and bulldozer operator. On that day, the rock truck he was operating was struck twice from behind by a bulldozer in an attempt to push the truck up a slope. He was in pain when he got out of the truck, but did not immediately report the injury. Perry had been "hit hard" in the past, and believed over-the-counter pain medication would offer relief. However, he had difficulty getting out of his vehicle when he got home and sought treatment at the emergency room the following day. He received "some shots" but had to return to the emergency room the next day.

Perry testified he injured his neck and back on the left side as a result of being thrown forward or jostled in his seat. He has back pain and symptoms in both legs. He experiences increased pain if he sits for long periods, and numbness down to his left foot. Perry

returned to work for one day and has not sought other employment.

Perry acknowledged prior problems with his neck and back, but could not recall any prior injuries. Medical records indicate he received treatment for his back and left leg pain including medication and epidural injections from Dr. Joseph DeLapa prior to the injury. Perry stated the epidural injections received prior to the work injury were more effective than those he received following the work injury. He also acknowledged his back problems date back to at least 2002 and that, ten days prior to the work incident, his doctor had recommended and scheduled a repeat MRI of the low back.

Dr. David P. Herr conducted an independent medical examination ("IME") on March 23, 2012, at Perry's request. He diagnosed degenerative disc disease of the lumbar spine, left S1 radiculopathy, left sciatica, and a herniated disc at L4-5. Using the range of motion model, Dr. Herr assigned a 19% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Herr found no basis to apportion the impairment rating, noting there was "a prior episode of back pain which was transient with no lost time that did not result in impairment" which

would be classified under DRE I. Dr. Herr opined Perry was permanently totally disabled as a result of the work injury.

Dr. DeLapa's records document treatment from December 27, 2011 through February 29, 2012. A December 27, 2011 MRI revealed a large left paracentral disc extrusion at L4-5 which had slightly progressed from the previous MRI study. Dr. DeLapa diagnosed an acute flare-up of this lumbar disc herniation. He administered injections on February 1, 8, and 21, 2012.

Mayo also introduced pre-injury consultation records from Dr. DeLapa, documenting treatment from April 8 through October 24, 2011. Dr. DeLapa treated Perry for back pain with radiculopathy in the left leg. He administered a series of epidural injections in April and May 2011. On June 30, 2011, Perry requested a TENS unit, and Dr. DeLapa noted Perry may need a neurosurgical evaluation.

Perry submitted records from Ironton Primary Care Center concerning treatment beginning December 25, 2011. An MRI revealed multilevel degenerative changes with findings more pronounced at L4-5 on the left with large left paracentral disc extrusion. This was noted as more pronounced compared to a previous exam.

Dr. Ira B. Potter performed an IME on September 19, 2012 at Perry's request. He diagnosed lumbosacral sprain/strain and bilateral radiculitis, left worse than right, as a result of the December work injury. Dr. Potter noted a ten-year history of low back pain sufficient to have warranted regular medical care with Dr. Matos and intermittent care with a pain management physician. Dr. Potter viewed the December work incident as an aggravation of a pre-existing, active and somewhat disabling low back condition, transforming it into completely disabling reality. He assigned an 8% impairment pursuant to the AMA Guides, with 5% attributable to the pre-existing chronic lumbar pain.

Dr. Rockford J. Meadows treated Perry on December 12, 2011, ten days prior to the alleged work injury. He noted symptom onset had been chronic for several months. Perry complained of pain in the bilateral lumbosacral paraspinal muscles, worse on the left with paresthisias in the left lower extremity. Dr. Meadows noted previous low back problems as "same" and noted epidural steroid injections had provided some benefit in the past. Dr. Meadows noted Perry had sciatic/radicular radiation to the left distribution. He prescribed medication and scheduled an MRI.

Dr. Joseph R. Leith treated Perry for a knee condition. In his March 14, 2011 note, Dr. Leith notes Perry reported his back problems were flaring up and he was having radicular pain down the length of his leg.

At Mayo's request, Dr. Russell L. Travis conducted a medical records review on May 4, 2012. He noted there were significant diagnostic findings prior to the alleged work injury including left-sided pain with sciatic pain. Dr. Travis stated Perry did not sustain any change in condition as a result of the work incident from his pre-injury state. This conclusion was based on his comparison of the MRIs taken before and after the incident, which revealed no significant change in Perry's status after the December 2011 injury. He noted the large L4-5 extrusion on the left in March 2011 was essentially equal in size to that seen in the December 2011 MRI, and the L5 root was compressed prior to the December incident. After reviewing reports of Drs. Potter and Herr, Dr. Travis opined they either had not been provided with records of treatment and diagnostic studies created just prior to the work injury or had not reviewed them thoroughly. Dr. Travis stated Dr. Potter's assessment of an 8% impairment was more reasonable than the 19% assigned by Dr. Herr; however, Dr. Travis stated none of the impairment was

attributable to the work incident and the entirety of the impairment was pre-existing and active. Dr. Travis noted the large herniation at L4-5 had been present since at least March, 2011 and Perry was symptomatic since at least 2006.

Dr. David J. Jenkinson performed an IME on October 30, 2012 at Mayo's request. Perry initially denied prior back problems but, upon further questioning, admitted having back pain which was "almost the same" prior to the incident. Perry reported his symptoms were much worse following the work incident. Relying on the fact that all of Perry's complaints subsequent to the event had been reported over several months prior to December 2011, Dr. Jenkinson opined Perry did not sustain any significant new injury. He also supported this opinion with a comparison of the MRI scans performed in March and December 2011, which do not show any significant difference. Dr. Jenkinson stated there was no evidence Perry sustained any significant new injury relative to the events of December 22, 2011. He assigned a 12% impairment pursuant to the AMA Guides, all of which was present prior to the work incident. Dr. Jenkinson found no basis for additional impairment as a result of the alleged work injury.

Eric Johnson, Ph.D. performed an independent psychological evaluation on May 29, 2012 at Perry's request. Dr. Johnson felt Perry's prognosis was fair for reduction of depression and anxiety with psychiatric consultation and possibly counseling. Dr. Johnson indicated he would assign a 3% impairment for Perry's current psychological condition, but anticipated it would resolve with treatment in approximately six months.

Dr. David Shraberg performed an IME on October 16, 2012 at Mayo's request, which included the administration of psychological tests. Dr. Shraberg noted Perry has struggled with chronic back pain since at least 2002, and his present symptoms were the same as he had previously experienced. Dr. Shraberg stated that, because of the work incident, Perry essentially "threw in the towel" and elected not to return to work. He further opined most of Perry's concerns were associated with dealing with his ailing mother and finances. Dr. Shraberg agreed with Dr. Johnson's opinion that Perry was exaggerating the severity of his emotional symptoms, and that his affect and description of activities were not consistent with severe anxiety and depression. He found no psychological impairment or need for treatment related to the work incident.

After reviewing the evidence, the ALJ concluded there was no evidence to support Perry's claim of a harmful change. She found the evidence was overwhelming that Perry's condition was pre-existing and active, particularly in light of his prior treatment for back pain and documented evidence of a pre-existing disc herniation. The ALJ further noted Perry underwent a series of epidural injections earlier in the year and had already been scheduled for another MRI prior to the alleged injury. Relying on the treatment notes from the Interventional Pain and Spine Center, which support a finding of a pre-existing active condition, and Dr. Travis' opinion of identical complaints since 2008 and the same herniation, the ALJ determined Perry failed to sustain his burden of proving he had a harmful change as a result of a work injury.

Perry filed a petition for reconsideration which included the arguments he now raises on appeal. By order dated April 26, 2013, the ALJ denied the petition for reconsideration, noting it was basically a re-argument of the merits. The ALJ noted she did not rely on Dr. Potter's opinion because his report contained no convincing explanation of a new injury on the day of the work accident or that anything about Perry's condition changed. She further explained she did not find Dr. Herr persuasive

because he apportioned none of the impairment to the pre-existing condition and Perry had already had an MRI and had been scheduled for another prior to the alleged injury. The ALJ noted Dr. Travis accurately and thoroughly reported Perry's condition, compared the before and after MRIs, and found no harmful change from the pre-injury condition.

On appeal, Perry argues the ALJ's decision is not supported by substantial evidence. Instead, Perry believes the weight of the evidence establishes the December 22, 2011 incident caused a dormant condition to become disabling and to result in impairment. He further contends the evidence compels a finding he is permanently totally disabled and he suffers from a compensable psychological injury. Finally, Perry asserts his testimony and the medical evidence provided by his treating and assessing physicians unequivocally establish a permanent impairment, and thus he is entitled to medical benefits for his condition.

Because Perry, the party with the burden of proof, was unsuccessful in proving a work injury, the question on appeal is whether the evidence is so compelling as to require reversal. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact-finder, has the sole

authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe parts of the evidence and disbelieve other parts, whether from the same witness or the same party's total proof. Caudill v. Maloney's Disc. Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough for Perry to show there is some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

After reviewing the ALJ's decision and the record in this matter, we believe the ALJ thoroughly reviewed the relevant evidence and reached a conclusion supported by substantial evidence. Perry's arguments on appeal are simply a re-argument of the merits of his claim. We are without authority to re-weigh the evidence and reach a conclusion contrary to that reached by the ALJ.

The ALJ indicated she was most convinced by the opinions of Dr. Travis, who stated Perry did not have a change in his condition as a result of the work incident. On reconsideration, the ALJ stated she found Dr. Travis

accurately and thoroughly reported Perry's condition, compared the pre and post-incident MRIs, and found no harmful change in condition from the pre-injury state. Dr. Travis' opinions are substantial evidence supporting the ALJ's finding. The evidence established Perry had a large herniated disc impinging his nerve and resulting in radiculopathy prior to the work incident.

The record contained ample evidence documenting active symptoms for years prior to the work incident. As noted by the ALJ, Perry received epidural steroid injections during the year of the alleged injury and received treatment just ten days prior to the work incident. In fact, a follow-up MRI was scheduled to be performed at the time of the incident. To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007). The record contained substantial evidence establishing Perry's condition was both symptomatic and impairment ratable prior to the alleged work injury. The ALJ could reasonably conclude Perry had a pre-existing active condition. Furthermore, substantial evidence supports the finding there was no change in

Perry's condition as a result of the alleged work injury. Hence, as the evidence does not compel a contrary result, Perry is entitled to neither income nor medical benefits as a result of the December 2011 incident.

The evidence does not compel a finding of a work-related psychological condition as a result of the work incident. Rather, the record contained conflicting evidence regarding the psychological condition. Dr. Shraberg found no psychological condition resulting from the work incident. His opinion is substantial evidence indicating the work incident did not result in a psychological condition. Even Dr. Johnson, who assessed an impairment for Perry's current condition, stated the condition could resolve with six months of treatment. The evidence falls far short of compelling a finding of a work-related psychological condition.

Accordingly, the March 22, 2013 Opinion, Award and Order rendered by Hon. Jane Rice Williams, Administrative Law Judge, and the April 26, 2013 order denying Perry's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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