Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 11, 2016

CLAIM NO. 201093553

HAROLD SPARKS PETITIONER/CROSS-RESPONDENT

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

WORLDWIDE EQUIPMENT RESPONDENT/CROSS-PETITIONER
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Harold Sparks ("Sparks") appeals from the August 12, 2015 Opinion and Order and the September 30, 2015 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). In this reopening, the ALJ determined Sparks had suffered a worsening of his condition, but is not permanently totally disabled. Sparks appeals that determination. Worldwide

Equipment ("Worldwide") cross-appeals, challenging the determination Sparks' impairment rating increased. We affirm.

Sparks injured his back on December 23, 2009 while working as a body shop manager for Worldwide. He settled his claim based on a 6% whole person impairment rating, and retained the right to reopen and to future medical benefits. Sparks testified his symptoms began to worsen about six months after the settlement was approved on April 7, 2011. He returned for additional medical care to Dr. Venu Vemuri, who recommended lumbar fusion surgery. Worldwide's workers' compensation carrier denied the proposed surgery. Sparks then visited Dr. David Weber, who recommended lumbar epidural steroid injections. This treatment was also denied.

Worldwide filed a medical fee dispute, which was denied by Order dated August 26, 2013. Sparks proceeded with the injections, which provided minimal relief. Dr. Weber then recommended a spinal cord stimulator trial, which was denied by Worldwide's insurance carrier. It filed a second medical fee dispute, which was denied by Order dated August 29, 2014. The spinal cord stimulator trial was successful, and Sparks had a permanent stimulator placed.

Sparks testified his current pain level is more intense and consistent than in April, 2011 despite the spinal cord stimulator and the injections. His pain is constant in his low back, with stabbing pain into his legs. He cannot lift more than 15 pounds and cannot sit more than 45 minutes without pain or numbness. He is limited in the length of time he can stand or walk, and the pain interrupts his sleep. He requires his wife's assistance to dress and is unable to perform routine household chores. Sparks is a bluegrass musician, but is no longer able to perform at the multiple music festivals he once attended. In April 2011 he was not taking medication, but now takes pain medication daily. He uses the stimulator approximately 17 hours a day.

Sparks submitted medical reports from Dr. Vemuri, who evaluated him as a new patient on November 26, 2012. Dr. Vemuri diagnosed lumbar degernative disease, lumbar instability, lumbar spinal stenosis and lumbar radiculopathy.

Sparks also submitted the independent medical evaluation ("IME") report of Dr. Anthony McEldowney dated January 2, 2015. Dr. McEldowney conducted a physical examination and reviewed Sparks' medical records. He diagnosed lumbar strain/sprain with exacerbation of a

previously dormant and asymptomatic lumbar spondylosis, with chronic pain syndrome. He attributed these diagnoses to the 2009 work-injury and, referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), assessed an 8% permanent impairment rating. He further stated there is a 2% increase in impairment due to chronic pain and disabled status. He opined Sparks is permanently disabled from work, and imposed physical restrictions against lifting over 8 pounds, pushing or pulling more than 20 pounds, stooping, squatting, bending, twisting, kneeling or crawling.

Additionally, Sparks submitted medical records from Dr. Amr El-Naggar. Sparks was seen on January 27, 2011 following a November 8, 2010 MRI, which revealed an annular tear causing mild protrustion and stenosis. Dr. El-Naggar assessed a 6% impairment rating, and imposed physical restrictions similar to those recommended by Dr. McEldowney.

Sparks also submitted medical records from Pikeville Medical Center and from Dr. Weber, concerning the steroid injections. Sparks provided an MRI report from Nicholasville Road MRI dated January 28, 2010, which revealed mild degenerative changes in the lumbar spine.

Dr. Rick Lyon conducted an IME on April 9, 2015. He performed a physical examination and reviewed medical records. Dr. Lyon diagnosed myofascial low back pain and lumbar degenerative disc disease with mild arthritis. Referencing the AMA Guides, Dr. Lyon opined Sparks has a 5% impairment rating and does not believe he is totally disabled. He further concluded Sparks' condition has not worsened since 2011.

Sparks underwent two vocational evaluations. Dr. Luca Conte concluded Sparks is able to return to sedentary work, noting his functional capacities have not significantly changed since 2011 following the implantation of the spinal cord stimulator. Dr. Conte also noted Sparks' high school degree, consistent work history, and successful management and computer skills. In addition to sedentary office work, Dr. Conte concluded Sparks could perform light vehicle operations.

Dr. Robert Tiell conducted a vocational evaluation and concluded Sparks is unable to perform sedentary work. He noted Sparks' weak concentration levels due to pain, and doubted he has the skills to transition to jobs involving reading and clerical skills. He also took into account the fact Sparks has not worked in five years, and his extensive physical restrictions.

The ALJ first noted Dr. El-Naggar assigned a 6% impairment rating in 2010, upon which the prior settlement was based. Relying on Dr. McEldowney's report, the ALJ concluded Sparks' condition had worsened and he now has an 8% impairment rating. As to the extent of Sparks' current disability, the ALJ explained:

> The ALJ is presented with the opinions Drs. McEldowney and Dr. El-Naggar. Dr. El-Naggar assessed the same 6% impairment upon which the prior settlement was based. Dr. McEldowney found that the Plaintiff has an 8% whole person impairment including an additional 2% for pain and disability status.
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> 17. Likewise, the Plaintiff has testified that he has been experiencing increased pain and that he has a spinal cord stimulator. He also testified that he is required to take narcotic pain medication three times per day.
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> 18. The ALJ finds that the opinion of Dr. McEldowney regarding impairment is supported by the testimony of the Plaintiff and makes it more convincing and credible regarding impairment. The ALJ therefore finds that the Plaintiff has suffered a worsening of condition and that he now has an 8% whole person impairment. The medical evidence provided confirms, and it is therefore undisputed that the Plaintiff does not retain the ability to return to the same type of work. The ALJ so finds.
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> 19. Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an

injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. *Hill v. Sextet Mining Corporation*, 65 SW3d 503 (KY 2001).

20. "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical restrictions will interfere with his vocational capabilities. *Ira A. Watson Department Store v. Hamilton*, 34 SW3d 48 (KY 2000). In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. *Id.*

21. Dr. Conte opined that the Plaintiff could work in automotive sales/customer service/insurance; marketing and sales; production support occupations; and service occupations. He added that the Plaintiff is a high school graduate, has a solid work history, successful management skills, computer skills, is a musician, and is a music promoter. Dr. Lyon stated that there is no objective evidence to support total disability. He also stated that there are employment opportunities for the Plaintiff, which would allow him to be gainfully employed.

> 22. The ALJ is convinced by this consensus of opinion and finds that the Plaintiff remains capable of providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

Both parties petitioned for reconsideration. Worldwide requested additional findings of fact regarding Sparks' increased impairment. In the September 30, 2015 Order on Reconsideration, the ALJ reiterated his reliance upon Dr. McEldowney's impairment rating. Citing Sparks' testimony and Dr. McEldowney's report, he also stated he was "convinced [Sparks] has experienced an increase in pain sufficient to justify the slightly increased impairment rating." Sparks' petition requested additional findings of fact concerning permanent total disability. The ALJ stated:

> The ALJ is most persuaded by the opinion of Dr. Conte regarding the Plaintiff's ongoing abilities. Dr. Conte is convincing in his criticism that Dr. McEldowney while citing increased pain, has only minimally changed the restrictions of the Plaintiff. Dr. Conte also observed that the Plaintiff drove an hour and forty-five minutes to the IME and that he regularly drives two and one-half hours each way to pain management appointments. The ALJ finds in accordance with Dr. Conte that because the Plaintiff is a high school graduate and has a solid work history outside of physical labor, that there are employment opportunities for the

> Plaintiff, which would allow him to be gainfully employed.

Sparks now appeals, arguing the evidence compels a finding he is permanently totally disabled. Worldwide cross-appeals, challenging the ALJ's determination Sparks' condition worsened. We begin with Worldwide's cross-appeal.

Sparks bore the burden of proof to establish his condition had worsened. Because he was successful, the question on appeal is whether substantial evidence supports the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Dr. McEldowney's medical report constitutes the requisite substantial evidence to establish Sparks now suffers an 8% whole person impairment. Worldwide claims the impairment rating is invalid because it is based on Sparks' subjective complaints of pain, rather than objective medical evidence. Like Dr. Lyon, Dr. McEldowney placed Sparks in DRE Lumbar Category II, which provides for a range of impairment between 5% and 8%. It also allows

for consideration of the patient's ability to perform activities of daily living which, if adversely impacted, should be reflected in a higher impairment rating. We note Worldwide has not argued Dr. Sparks' impairment rating contradicts the AMA Guides. Therefore, we find no error in the ALJ's reliance upon Dr. McEldowney's impairment rating to conclude Sparks' condition has worsened.

We next turn to Sparks' appeal, in which he argues the ALJ's analysis concerning permanent total disability is not sufficient and his conclusion is against the weight of the compelling evidence. Permanent total disability is "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury." KRS 342.0011(11). Work means the ability to provide "services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(34). In considering whether an injured employee is permanently totally disabled, the ALJ is required to conduct an individualized analysis of the injured worker's age, education, vocational skills, post-injury medical restrictions, and the likelihood of resuming work. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Here, the ALJ considered that Sparks is a high school graduate who has managerial experience and a work history outside of physical labor. He acknowledged Sparks' complaints of increased pain and, earlier in the Opinion, summarized his testimony regarding his inability to perform certain day to day tasks. He likewise noted Sparks' is taking more pain medication than at the time of his settlement agreement. However, the ALJ weighed these circumstances against the fact his physical restrictions remained largely unchanged since 2010.

We conclude the ALJ's analysis is sufficient to satisfy the individualized analysis required by Ira A. Watson and to apprise the parties of the basis of his decision. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988). Sparks essentially urges the ALJ to weigh his subjective complaints of pain more heavily in his analysis. This Board is without authority to mandate such a finding. It is within the ALJ's discretion to determine the weight to be afforded the evidence. The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Accordingly, the August 12, 2015 Opinion and Order and the September 30, 2015 Order on Petition for Reconsideration rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, CONCURS IN RESULT ONLY.

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