OPINION ENTERED: February 8, 2013

CLAIM NO. 201166827

JEFFREY STUMBO PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

JONES OIL COMPANY
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Jeffrey Stumbo ("Stumbo") seeks review of the opinion and order rendered October 1, 2012 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ") dismissing his claim against Jones Oil Company ("Jones Oil") after finding no work-related event or injury occurred. Stumbo

also seeks review of the order rendered October 30, 2012, denying his petition for reconsideration.

On appeal, Stumbo argues the ALJ committed a patent error in “following the impairment rating of Dr. David Jenkinson” since he noted objective medical evidence of an injury, despite assessing a zero percent impairment rating. Stumbo also argues the ALJ’s opinion is clearly erroneous as a matter of law because he incorrectly stated the mechanism of injury. Stumbo also argues the ALJ’s opinion is not supported by substantial evidence. Stumbo next argues the ALJ acted arbitrarily by emphasizing his opinion of Stumbo’s lack of work ethic since it has no bearing on whether he sustained a work-related injury. Finally, Stumbo argues the ALJ’s inferences were unreasonable since they were improperly drawn from the irrelevant question of whether his injury was causally related to pushing the gas pedal rather than awkward positioning. We disagree and affirm finding the evidence of record does not compel a contrary result.

Stumbo filed a Form 101 on March 12, 2012 alleging he injured his right foot on November 21, 2011 when he “overextended right foot while driving in a limited space truck cab.” In support of the Form 101, Stumbo attached the November 29, 2011 record from Dr. Paula Ashby-Jones who

noted complaints of right heel pain for approximately one and half weeks and diagnosed right heel spur and foot pain. He also attached records from Dr. Scott Chaney of Pikeville Medical Center dated January 9, 2012 who diagnosed an ankle sprain. An MRI of the right ankle performed the same day demonstrated a small longitudinal split thickness tear of the distal Achilles tendon; and partial tears of the posterior talofibular, the spring, and possibly the tibiocalcaneal ligaments.

Stumbo testified by deposition on June 4, 2012 and at the hearing held July 31, 2012. Stumbo was born in May 1969 and is a resident of Harold, Kentucky. He is a high school graduate and has a commercial driver's license. Prior to November 21, 2011, Stumbo testified he received medical treatment for knee pain and bulging discs in his lower back and neck. He stated he had a right heel spur and gout in both feet prior to November 2011. Stumbo denied experiencing other problems relating to his feet or ankles before November 2011.

Stumbo began working for Jones Oil in September 2010 as a truck driver hauling diesel fuel and gasoline. His job required him to drive, sit, load and unload petroleum products, climb onto the truck and tank, and pull hoses to fill the tank. Stumbo testified he worked an

average of sixty to sixty-five hours, and drove approximately one thousand miles weekly.

Stumbo testified at the deposition he drove a "Mack" 10-wheeler tanker truck in November 2011, which he had been driving for approximately six months. When asked what had happened on November 21, 2011, Stumbo testified as follows:

> A: Okay. My foot began to hurt because of the limited space in the cab. It was an older truck. And the way I had to position my foot to the fuel pedal, it was extending it back. And for long periods of time, it kept hurting and getting worse, and I kept working and working; and, even they knowed [sic] that I was struggling trying to get in the truck. But, I kept trying to work because I thought maybe it was my gout acting up or my heel spur, okay. So I kept working. Well, that Wednesday- - - Wednesday before- - - Well, that Wednesday before Thanksgiving, I worked. I went to West Virginia. I got back about 8 o'clock I guess that night, and I just barely could get out of the truck and get into my vehicle.
>
> . . .
>
> A: Well, the way I had to hold my foot, I knowed [sic] it had to be something--- had to be something torn because the way I had to hold my foot. I knowed [sic] it was in a strain back all the time, over extending. And I knowed [sic] it had to be something more because it was more pain than I'd even had with my gout and other things. So, I knowed [sic] it had to be something major other than that.

> Q: Did it seem like it just started all the sudden and you knew when it happened?
>
> A: Yeah.

At the hearing, Stumbo, who weighs approximately 350 pounds, testified he initially drove a different truck which had enough room in the cab for him. He then drove an older model Mack truck for about six months which was "not that roomy cause it's an older model truck and my legs stayed in a cramp all the time" and had to hold his foot tilted to the side for long periods of time. Stumbo testified he began driving a newer model truck at the end of October which he continued to drive for a few weeks. He again testified concerning the events of November 21, 2011:

> Q: Okay. All right. Now, when did your foot start having problems?
>
> A: Real bad, around the 21st of November.
>
> Q: Okay.
>
> A: That's when I really started having a lot of problems out of it.
>
> Q: All right. So you started having-- Had you had problems with it before?
>
> A: Not that bad, no.
>
> Q: Okay. Well--

> A: Seems like it just kept getting worse.
>
> Q: Okay. That's what I was asking.
>
> A: Yeah.
>
> Q: So you were having some problems before and then it got worse up to the 21st?
>
> A: It kept getting worse and got real bad the 21st.
>
> Q: All right.
>
> A: I knowed [sic] they [sic] were [sic] something wrong.
>
> Q: All right. Was there anything that you were doing on the 21st?
>
> A: Other than driving that truck, no.
>
> Q: Okay. I mean, there wasn't anything different that you did that day?
>
> A: No. I just -- I did my same procedure every day.

Despite his deteriorating right foot condition, Stumbo testified he continued to work through November 23, 2011. On his last day of work, he testified he could barely exit the truck due to the pain in his right foot and ankle. Stumbo went to the emergency room the following night and followed up with his family physician, Dr. Paula Jones, who referred him to Dr. Scott Chaney. Dr. Chaney ordered an MRI of his right foot. Thereafter, Dr. Chaney placed his foot

in a cast for three weeks, then a walking boot, and then prescribed a brace. Dr. Chaney also recommended physical therapy.

Stumbo testified he has not worked since November 23, 2011. Stumbo experiences right foot pain “sometimes,” but is not as bad as it was initially. He experiences weakness in his right foot noting sometimes it “gives way”. Stumbo currently wears a brace and uses a cane. Stumbo testified surgery has not been recommended by any doctor and he is currently under no treatment plan. Stumbo testified he is not physically capable of going back to work for Jones Oil, but has thought about going back to school or learn a new trade.

John Rodney Hill, a controller for Jones Oil, testified at the hearing regarding notice of the alleged incident, an issue not before this Board. Larry Epling (“Epling”), a truck mechanic for Jones Oil, also testified at the hearing he is familiar with the R60 Mack truck and it’s inside setup. He testified as to the dimensions inside the cab, stating there is twenty-four inches from the door to the middle console and a three inch clearance between the center console and right gas foot pedal. He also testified it would not be possible to turn the heel inward toward the console if the foot was on the gas pedal because there is

not enough room to do so. In his experience, Epling could not recall any worker who has complained of right foot issues resulting from driving this type of truck, nor could he recall Stumbo expressing difficulty with the gas pedal.

Stumbo filed medical records from Drs. B. Scott and Sheryl Chaney of Pikeville Foot Care Center, with whom he treated from November 30, 2011 through February 29, 2012. On November 30, 2011, Stumbo complained of right heel pain resulting from being unable to place it in a natural position for prolonged periods of time while driving a truck for work. Dr. Chaney noted Stumbo is severely overweight. Dr. Chaney diagnosed a partial tear of the Achilles tendon and tears of the talofibular and spring ligament. Dr. Chaney treated Stumbo with a cast, walking boot and brace, and also recommended physical therapy. On January 12, 2012, Dr. Chaney noted Stumbo's inability to perform his job duties as a driver because of his cast and the requirement to stay non-weight bearing at all times. On February 29, 2012, Dr. Chaney noted continued foot pain and restricted Stumbo from work until March 30, 2012.

Stumbo submitted a Form 107 medical report dated April 25, 2012 by Dr. Anbu Nadar, an orthopedic surgeon, who examined him on April 3, 2012. Stumbo reported he was driving a truck and "while pressing on the gas pedal, he

felt a sharp pain in his right foot over the plantar aspect and also the back of the ankle." He complained of pain in his right ankle and heel, with burning sensation, right ankle weakness, and difficulty standing or walking. Dr. Nadar reviewed medical records, including the January 9, 2012 MRI report. Dr. Nadar diagnosed a right ankle sprain with partial Achilles tendon tear and plantar fasciitis. He also noted Stumbo's injury is the cause of his complaints. Dr. Nadar assessed an 8% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, and recommended physical therapy. Dr. Nadar indicated Stumbo retains the physical capacity to return to the type of work performed at the time of injury. He also opined Stumbo has "limitation in work activity that requires prolonged sitting, standing, walking, and walking on uneven terrain and activity of such nature."

Jones Oil submitted a medical records review by Dr. Daniel Wolens dated December 21, 2011. Dr. Wolens noted Stumbo reported he injured his foot when pushing on the gasoline pedal of his truck. After reviewing the medical records, Dr. Wolens opined the presumptive diagnosis of posterior tendon tear, or any other tendon tear, cannot be expected from having to push on a gasoline pedal. Rather, the greater risk to Stumbo's foot is his morbid obesity.

Therefore, “pushing on a gasoline pedal is an infinitesimally small force compared to the amount of pushing the foot must do to bear body weight.” Dr. Wolens ultimately concluded Stumbo’s foot condition is not causally related to pushing on the gas pedal of a gasoline truck.

Jones Oil also submitted the June 13, 2012 medical report by Dr. David Jenkinson, an orthopedic surgeon. Stumbo reported his right foot condition occurred on November 21, 2011 and was “caused by the truck having limited leg room causing him to hold his foot in an ‘overextended’ position for long periods of time.” Stumbo reported his foot problem appeared gradually, but became worse around November 21, 2011. Dr. Jenkinson noted he reviewed the January 9, 2012 MRI report and stated “it is apparent when reading the details of this report that the abnormalities noted on this MRI scan were extremely minor.” He further concluded the MRI scan reports “very minor abnormality” and it did not suggest significant trauma to the foot or ankle.

Dr. Jenkinson opined there is no evidence Stumbo had any work event causing a significant injury to the foot or ankle. He noted it was possible Stumbo had some plantar fasciitis related to his morbid obesity. He did not find credible the theory his foot was injured by holding it in an

awkward position on the gas pedal. Dr. Jenkinson assessed no impairment rating since he determined the foot examination was normal and provided no objective evidence Stumbo sustained an injury. Likewise, Dr. Jenkinson did not recommend permanent restrictions or future medical treatment, and found Stumbo is physically capable to return to work as a truck driver. He opined Stumbo engaged in symptom magnification and self-limiting behavior.

In dismissing Stumbo's claim, the ALJ stated as follows in the October 1, 2012 opinion and order:

> The threshold issue in this claim is whether or not the plaintiff sustained a work-related injury as defined by the Act. KRS 342.0011 defines "injury" as meaning "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." The claimant contends he has sustained a permanent injury to his right foot and/or ankle due to depressing the accelerator on the Mack truck which he was driving for Jones Oil Company. This argument becomes a little confusing, because claimant was assigned a newer model truck with a more spacious interior in the cab approximately three or four weeks prior to his reporting a work-related injury and his trip to the emergency room. The ALJ had the opportunity to observe Mr. Stumbo during his testimony given at the final hearing. Candidly, the ALJ finds it very difficult to believe

that an injury occurred on or about November 21, 2011, as a result of any work-related activity. The claimant was not persuasive in the giving of his testimony. He did not impress the ALJ as being motivated or in having any real interest in working. He gave a rather passive impression and he appeared to be satisfied with his alleged state of disability. When asked whether or not he would want to learn some new trade, business, or job, Mr. Stumbo hesitated for a seemingly long time before stating that he didn't think he would be able to do anything.

The claimant bears the burden of proof and the risk of non-persuasion with respect to every essential element of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). In this claim, the ALJ has read and considered the evidence contained in the record and listened with interest to the plaintiff's testimony at the hearing. The Plaintiff simply exhibited little credibility. His testimony did not appear sincere and genuine. When asked about his level pain, he reported it was a "ten", however, he did not appear to be in any apparent distress, pain, or discomfort at the time. He did not appear to have any interest in learning a new trade or business. He showed no interest in becoming employed again and he appeared content to remain off from work. He has filed a Social Security disability claim, further indicative of his resignation from the work force. He has never had surgery and he acknowledged that no physician has recommended any surgical procedure. His basic description concerning the positioning of his foot in the cramped quarters of the cab of the truck was simply unconvincing. The ALJ's observations and findings herein are

> supported by the findings and opinions of both Dr. Jenkinson and Dr. Wolens. The ALJ is not persuaded by Dr. Nadar, who seemed to be under the impression that claimant's injury was the result of a sudden, traumatic incident, when in fact the plaintiff testified that it manifested itself in a gradually worsening pattern.
>
> Having found that no work-related event occurred and that no injury was sustained by the claimant, there is no need for the ALJ to address any of the remaining issues presented herein. The claim of Mr. Stumbo must be and hereby is denied and dismissed.

Stumbo filed a petition for reconsideration arguing the ALJ committed a patent error in relying upon Dr. Jenkinson's impairment rating since he found no significant trauma despite indicating the MRI showed a tear in the Achilles tendon and several ligaments. He also argued the ALJ erred by placing himself in the role of physician when he stated he found it difficult to believe Stumbo sustained an injury as a result of any work-related activity. Stumbo argued the overwhelming evidence supports a finding in his favor. Finally, he argued Dr. Jenkinson's opinions were not expressed within a reasonable degree of medical probability.

By order dated October 30, 2012, the ALJ denied Stumbo's petition for reconsideration stating "The ALJ finds again that the claimant's proof of a work-related injurious

event was not persuasive or convincing. This finding is in fact supported by the opinions of Dr. Jenkinson and Dr. Wolens."

On appeal, Stumbo again argues the ALJ committed a patent error by relying upon Dr. Jenkinson's opinions in finding no work-related incident or injury occurred. Stumbo asserts the ALJ failed to recognize Dr. Jenkinson noted the MRI report showed an Achilles tendon tear and several ligament tears, despite assigning a zero percent impairment rating. Stumbo asserts this constitutes objective medical evidence of injury, and the ALJ's finding to the contrary was a patent error.

Stumbo argues the ALJ erred as a matter of law because he did not "understand the causation issue." Stumbo asserts the ALJ incorrectly stated he contends he has sustained permanent injury to his right foot and/or ankle due to depressing the accelerator on the Mack truck he was driving. Rather, Stumbo asserts his injury is attributable to the "awkward positioning to which his right foot was subjected, due to the limited space in the cab of the truck." This mechanism of injury was also recited in Dr. Jenkinson's opinion.

Stumbo argues "the ALJ's finding that 'no work-related event occurred' is not supported by substantial

evidence because the ALJ's analysis improperly turned on an inaccurate and irrelevant question of causation." He alleges both the ALJ and Dr. Wolens failed to summarize the evidence accurately and the evidence upon which the ALJ relied does not constitute substantial evidence. Similarly, Stumbo argues the ALJ "lacked adequate evidence to support his rejection of Dr. Nadar's evaluation."

Stumbo argues the ALJ acted arbitrarily in relying upon and emphasizing his opinion of Stumbo's lack of work ethic since it has no bearing on whether he sustained a work-related injury.

Finally, Stumbo argues "inasmuch as the ALJ's inferences were improperly drawn from the improper and irrelevant question whether [his] injury was causally related to pushing the gas pedal, rather than awkward positioning, the ALJ's inferences were unreasonable." Stumbo requests this Board reverse the opinion and order and enter a decision finding he sustained a work-related injury and assess an 8% impairment rating.

It is well established as the claimant in a workers' compensation proceeding, Stumbo had the burden of proving each of the essential elements of his cause of action, including occurrence of a work-related injury. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky.

2002); 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 that is 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).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. 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 cannot say the ALJ's finding no injury occurred on November 21, 2011, as a result of a work-related activity is so unreasonable based upon the evidence

that it must be reversed as a matter of law. Here, the ALJ found most persuasive the opinions of Dr. Jenkinson and Dr. Wolens. After reviewing the medical records, Dr. Wolens found Stumbo's foot condition not causally related to pushing on the gas pedal of a gasoline truck.

Stumbo's argument the ALJ erred in relying upon the June 13, 2012 opinion of Dr. Jenkinson is without merit. Stumbo is correct in citing Dr. Jenkinson noted the January 9, 2012 MRI report demonstrated a small longitudinal split thickness tear of the distal Achilles tendon; and partial tear of the posterior talofibular, the spring, and possibly the tibiocalcaneal ligament. However, Dr. Jenkinson opined "it is apparent when reading the details of this report that the abnormalities noted on this MRI scan were extremely minor" and there is "nothing in this MRI report to suggest significant trauma to this foot or ankle." Dr. Jenkinson found no evidence of any work event which caused a significant work injury to his foot or ankle. He opined a permanent impairment rating is inappropriate due to a normal foot examination and lack of evidence he sustained an injury. Likewise, Dr. Jenkinson did not recommend permanent restrictions or future medical treatment, and found Stumbo is physically capable to return to work as a truck driver.

We also find Stumbo's argument the ALJ erred by stating he alleges permanent injury to his right foot and ankle due to depressing the accelerator on the Mack truck equally without merit. After reviewing the record, we note conflicting evidence regarding the mechanism of injury, including inconsistent testimony from Stumbo. Where the evidence is conflicting, the ALJ may choose whom or what to believe, Pruitt v. Bugg Brothers, supra.

Therefore, the opinions of Dr. Wolens and Dr. Jenkinson constitute substantial evidence upon which the ALJ could base his determination Stumbo sustained no injury on November 21, 2011 as a result of a work-related activity.

Finally, we find unpersuasive Stumbo's argument the ALJ acted arbitrarily by emphasizing his opinion regarding Stumbo's lack of work ethic. The ALJ cited to several reasons he found Stumbo not credible or genuine, including his apparent lack of work ethic. The ALJ noted Stumbo's confusing and conflicting testimony regarding the mechanism of injury, and found his description concerning the positioning of the foot in the cramped quarters of the cab unconvincing. He observed Stumbo did not appear to be in any pain or discomfort despite reporting a pain level of "ten". After observing Stumbo during the final hearing, the ALJ found him neither motivated nor interested in

working. He also observed Stumbo seemed satisfied with his alleged state of disability and appeared content to remain off work.

We find the above observations and statements all well within the discretion afforded to the ALJ as the fact-finder. The Board is without authority to substitute its own appraisals of Stumbo's credibility or note other reasonable inferences which could have been drawn from the evidence. Whittaker v. Rowland, supra. The ALJ, as fact-finder, is free to pick and choose whom and what to believe. Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003). For that reason, we cannot say the ALJ's conclusions were unreasonable based upon the evidence. Speedway/Super America v. Elias, 285 S.W.3d 722, 730 (Ky. 2009); Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003).

Accordingly, the Opinion and Order rendered October 1, 2012 by Hon. Edward D. Hayes, Administrative Law Judge, and the Order ruling on the petition for reconsideration issued October 30, 2012, are hereby **AFFIRMED.**

ALL CONCUR.

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