Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 21, 2014

CLAIM NO. 200983807

JUAN VAZQUEZ PETITIONER

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

BUILDERS SERVICES GROUP
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Juan Vazquez ("Vazquez") appeals from the September 16, 2013, Opinion and Award and the October 31, 2013, Order on Petition for Reconsideration of Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"). In the September 16, 2013, Opinion and Award, the ALJ dismissed Vazquez's claim for permanent partial disability ("PPD") benefits and future medical benefits and awarded medical

benefits from the date of injury, June 1, 2009, until the date of maximum medical improvement or August 21, 2012.

On appeal, Vazquez argues the ALJ erred in her analysis of Vazquez's pre-existing condition because Vazquez's condition was not symptomatic. Additionally, Vazquez asserts the ALJ erred in failing to award future medical benefits.

The Form 101 alleges on June 1, 2009, Vazquez injured his right shoulder while in the employ of Builders Services Group. The injury occurred in the following manner:

> On or about June 1, 2009 Plaintiff was lifting a ladder weighing 35 pounds and felt a pain in his Right [sic] Shoulder [sic]. Plaintiff suffered [sic] work-related injury causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides.

The record indicates that in 2004 Vazquez sustained a rotator cuff tear in the right shoulder after falling from a ladder which necessitated surgery. The surgery was performed by Dr. William Moss.

The first Benefit Review Conference ("BRC") order lists unpaid or contested medical expenses [handwritten: "Dr. Rueffs bill for office visit 10/19/10"] as the contested issue. Under "other" is the following:

"Bifurcated on issues of entitlement to medical treatment, including surgery and payment of TTD benefits. All other issues are expressly reserved."

By Interlocutory Order dated March 26, 2012, Hon. Caroline Pitt Clark, Administrative Law Judge ("ALJ Clark") found Vazquez's right shoulder condition to be causally related to the June 1, 2009, work injury, awarded temporary total disability ("TTD") benefits, and placed the claim in abeyance pending maximum medical improvement ("MMI").

The second BRC order, dated June 10, 2013, lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the ACT, and exclusion for pre-existing disability/impairment. Under "other" is "education level."

In a section entitled "pre-existing active disability," the ALJ determined as follows in the September 16, 2013, Opinion and Award:

> **B. Pre-existing Active disability.**
> **1. <u>Principle of law</u>.**
>
> When work-related trauma arouses or exacerbates a pre-existing condition, it has caused a harmful change in the human organism, *i.e.*, an injury as defined by KRS 342.0011(1). Although impairment that results is compensable, the type and duration of benefits depends on whether the impairment is

permanent or temporary. To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. "[T]o be characterized as active, 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 S.W.3d 261 (Ky. App. 2007). The employer bears the burden of proving the existence of a pre-existing, active disability.

2. <u>Findings of fact.</u>

Vazquez suffered from active pre-existing disability that was ***impairment ratable pursuant to the AMA Guidelines*** at the time of the June 1, 2009 event as he had undergone surgery for the prior injury and had been rated at 14% following surgery for the 2004 injury.

3. <u>Analysis</u>.

The core issue in this case is whether Plaintiff suffered from a pre-existing active disability. The overwhelming evidence is that he did suffer from a pre-existing active impairment immediately before this work injury. The issue then becomes whether this injury was only temporary (requiring medical treatment) or whether it caused additional permanent impairment. This is a medical question and therefore it must be determined which of the medical opinions are more persuasive. The opinion of Dr. Fadel is most convincing as it thoroughly compares the range of motion measurements before and after the June 1, 2009 event. Even Dr. Rueff, though placing more emphasis on the

> 2009 event, did specifically state the pre-existing condition contributes greatly to the chronic massive rotator cuff tear.

In his September 27, 2013, petition for reconsideration, Vazquez requested a finding he did not have an active, pre-existing condition prior to his work injury. In the alternative, Vazquez requested additional findings of fact regarding his condition prior to his work injury.

In the October 31, 2013, Order on Petition for Reconsideration, the ALJ stated as follows:

> This matter comes before the Administrative Law Judge (ALJ) pursuant to the Petition for Reconsideration of September 24, 2013 where Plaintiff asks the ALJ to reconsider the Opinion, Award and Order of September 16, 2013, specifically, the finding Vasquez suffered active pre-existing, impairment ratable disability at the time of the June 1, 2009.
>
> As stated in the Opinion, the opinion of Dr. Fadel was found most persuasive. He outlined the extensive surgical repairs from the 2004 tear and found the current condition attributable to failure of the 2004 repair, with the current condition predating the subject injury. He did not believe the recurrent tear was the result of the June 1, 2009 injury. Based on the physical examination in the review of prior records he could not discern an injury to the shoulder beyond the joint sprain. He found no clinical data to support a conclusion of harmful change

> to human organism. Range of motion measurements from before and after the 2009 injury showed an increased range of motion and not a worsening. See pages 8 – 9 of the Opinion.

In Dr. Fadel's November 28, 2012, report, he diagnosed the following:

> Status post arthroscopically assisted repair of a rotator cuff tear with acromioplasty and Mumford procedure, right shoulder.
>
> Recurrent residual tear right rotator cuff or failed cuff repair
>
> Arrested motion right shoulder with disuse atrophy of rotator components
>
> Degenerative joint disease right gleno-humeral articulation

On causation, Dr. Fadel opined as follows:

> Based on the known facts as relates to tears of the rotator cuff and the known facts in this case, it is my opinion Mr. Vazquez's current persistent rotator cuff tear represents a failure of his repair in 2004 and pre-dates the subject injury. I am unable to support a conclusion of recurrent tear arising from the work accident on 6/1/09.

Dr. Fadel assessed an 8% whole person impairment rating attributed <u>exclusively</u> to Vazquez's prior 2004 shoulder injury and failed surgery. In his report, Dr. Fadel opined as follows regarding his impairment rating:

"Therefore, I am unable to assign any impairment contribution to the June 1, 2009 accident."

During his March 5, 2013, deposition, Dr. Fadel opined Vazquez suffered from a "[s]prain injury superimposed upon failed cuff repair of the right shoulder."

While Vazquez, and to some extent the ALJ, has characterized this issue as being one of pre-existing active impairment pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), that is not the case. It is clear from the wording of both the September 16, 2013, Opinion and Award and the October 31, 2013, Order on Petition for Reconsideration that the ALJ relied upon the opinions of Dr. Fadel who attributed all of Vazquez's 8% impairment to the 2004 injury and rotator cuff surgery and opined that Vazquez suffered a temporary strain on June 1, 2009. Dr. Fadel stated: "I am unable to assign any impairment contribution to the June 1, 2009 accident." In relying upon Dr. Fadel's opinions and impairment rating, or lack thereof, there is no issue of apportionment for pre-existing active disability, as Dr. Fadel has apportioned the entirety of Vazquez's impairment to the 2004 injury. Stated another way, relying on Dr. Fadel’s opinion the ALJ found the subject injury did not result in an impairment

rating thereby obviating the need to determine whether the pre-existing impairment was active at the time of the subsequent work injury. Nevertheless, the ALJ determined Vazquez did suffer from a pre-existing *active* condition at the time of the injury, an unnecessary finding since the ALJ relied on Dr. Fadel's opinion that no impairment was attributable to the June 1, 2009, incident. This finding informs the Board that the ALJ did not believe the temporary strain sustained on June 1, 2009, was an arousal of a pre-existing *dormant* condition. As the ALJ certainly has the discretion to rely upon Dr. Fadel's opinions and impairment rating, the dismissal of Vazquez's claim for PPD benefits cannot be disturbed.

Vazquez also argues the ALJ erred by failing to award future medical benefits. Concerning this issue, the ALJ determined as follows in the September 16, 2013, Opinion and Award:

> **D. Unpaid and/or Future Medical Expenses.**
>
> **1. <u>Legal principle.</u>**
>
> Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state that eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits. Moreover, it states clearly that

liability for medical benefits exists "for so long as the employee is disabled regardless of the duration of the employee's income benefits." *See FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007). To be compensable, however, medical treatment must be reasonable and necessary. Additionally, if proof has been presented that the claimant will not require future medical treatment for the effects of his work-related injury, an ALJ can make a valid determination that the claimant is not entitled to future medical benefits. *See Mullins v. Mike Catron Construction*, 237 S.W.3d 561, 563 (2007).

2. <u>Findings of fact</u>.

Vazquez is entitled to medical benefits related to the cure and relief of the effects of the June 1, 2009 injury. However, he is not entitled, as a result of the June 1, 2009 injury to benefits beyond the point at which he reached MMI or returned to the baseline where he was at the time of the June 1, 2009 injury.

3. <u>Analysis.</u>

The only harmful change Vazquez experienced as a result of the work-related incident was a temporary flare-up of symptoms of his pre-existing condition. While Vazquez suffered a work-related injury, its effect was only transient. It resulted in no permanent disability or change in his pre-existing condition. The ALJ finds Dr. Fadel's assessment of his treatment most convincing. Dr. Fadel's opinion is compelling evidence supporting Defendant Employer's position Vazquez does not require any continued/future treatment for his injury. While

> Defendant Employer was responsible for treatment related to the June 1, 2009 event, its obligation related to that event has ceased.

In his September 27, 2013, petition for reconsideration, Vazquez also requested an award of future medical benefits.

The ALJ, in the October 31, 2013, Order on Petition for Reconsideration, stated as follows:

> As for entitlement to future medical benefits, consistent with the finding the 2009 work injury resulted in only temporary change, Plaintiff is not entitled to future medical benefits.

The ALJ relied upon the opinions of Dr. Fadel in determining Vazquez sustained only a temporary sprain injury on June 1, 2009. This diagnosis is not disputed by Vazquez. What is disputed, however, is the ALJ's failure to award future medical benefits.

While medical benefits can be awarded despite the absence of a permanent impairment rating or a permanent injury, it is not a requirement in every case. In Mullins v. Mike Catron Construction, 237 S.W.3d 561 (Ky. App. 2007), the Court of Appeals addressed FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), and noted the ALJ is entitled to exercise his or her discretion in making

a determination regarding future medical benefits. The Court stated as follows:

> Although the Supreme Court clarified the law and held that medical benefits can be awarded in the absence of a permanent disability award, there is nothing in their opinion which suggests that such benefits must be awarded in all cases. To the contrary, the Court clearly held that the claimant was entitled to future medical benefits because his injury was entirely work-related and required surgery. Moreover, the claimant testified, 'that he continued to receive physical therapy and no medical evidence indicated that future medical treatment would be unreasonable or unnecessary.'
>
> Unlike the facts presented in *FEI Installation,* there is evidence that Mullins will not require future medical treatment for any effects of his work-related injury. Since there is substantial evidence in the record to support the ALJ's determination that Mullins is not entitled to future medical benefits, it will not be disturbed. *Special Fund v. Francis,* 708 S.W.2d 641 (Ky.1986).

Mullins at 563.

In his November 28, 2012, report, Dr. Fadel opined that "[b]eyond a well designed and ongoing HEP, I do not believe the examinee requires any further formal treatment as related to the June 1, 2009 accident." The ALJ, within her discretion, relied upon this statement in concluding Vazquez will not need any further treatment;

consequently, she determined Vazquez is not entitled to future medical benefits. As this determination is supported by substantial evidence, it cannot be disturbed.

Accordingly, on all issues raised on appeal, the September 16, 2013, Opinion and Award and the October 31, 2013, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON JESSICA J LOGSDON
1102 REPUBLIC BUILDING
429 W MUHAMMAD ALI BLVD
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON LYN DOUGLAS POWERS
1315 HERR LN STE 210
LOUISVILLE KY 40222

ADMINISTRATIVE LAW JUDGE:

HON JANE RICE WILLIAMS
217 S MAIN ST STE 10
LONDON KY 40741