Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 23, 2013

CLAIM NO. 200986730

KINGS DAUGHTER'S MEDICAL CENTER PETITIONER

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

SARA RUNYON
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Kings Daughter's Medical Center ("KDMC") seeks review of the April 8, 2013, opinion, award, and order of Hon. Edward D. Hays, Administrative Law Judge ("ALJ") finding Sara Runyon ("Runyon") sustained work-related back and shoulder injuries on April 26, 2009. The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits enhanced by

the three multiplier, and medical benefits. KDMC also appeals from the May 17, 2013, order overruling its petition for reconsideration.

On appeal, KDMC argues the ALJ applied the wrong standard in determining whether Runyon had a pre-existing active condition.

Runyon, a licensed practical nurse ("LPN"), was injured on April 26, 2009, when a patient fell out of the bed and landed on her. Runyon alleged injuries to her shoulder, neck, and low back. In its Form 111, KDMC accepted the claim as compensable but stated there was a dispute regarding the amount of compensation.

Runyon testified at a November 30, 2012, deposition and the February 6, 2013, hearing. At her deposition, she explained how the injury occurred:

> Q: Could you tell me what happened on that day?
>
> A: I was –- I had just begun my med pass to my patients. I was standing at the door of the room of two of my patients when I heard two people yell for help. I locked up my drugs, because you have narcotics and things that you can't leave unattended. I locked up my drugs, ran across the hall to see what the problem was. When I got to the room, there were two phlebotomists standing against the wall at the foot of the bed pointing at the patient who was standing on the elevated – you

> know, the top of the bed was elevated –-
>
> Q: Yes.
>
> A: (Continuing) –- a fair bit.
>
> I went over to the gentleman. I didn't know him. He wasn't my patient, didn't know any history or anything about him. I went over to him and I said -– I started to steady him to try to get him to sit down because I knew he was going, going to fall or something. About the time my hand got on his back -– I don't know if it startled him or what, but he kind of half jumped, half fell backwards and landed on my shoulder.
>
> I went down almost to one knee, but I did not fall all the way to the ground. I got him back in the bed with his head at the feet and his feet in the head, but he was back in the bed. And I asked the two phlebotomists why they did not help me, and they said they weren't allowed to touch the patients. At about that time my charge nurse came in the room and got the patient turned the right way.
>
> Q: And you said your shoulder. Were you pointing to your right shoulder?
>
> A: Yes. I put –- I'm right handed. So I put my right hand to, to try to steady the patient.

Runyon indicated she immediately experienced shoulder, neck, and low back pain. She underwent treatment for these problems and Dr. Ignatiades performed a discectomy in February 2010.

The January 17, 2013, benefit review conference ("BRC") order reflects the contested issues were: "benefits per KRS 342.730, including multipliers, work-relatedness/causation, exclusion for pre-existing disability/impairment, and KRS 342.165 violation." Under the heading "Other" was handwritten "Violation of General Duties statute; Compensability of Future Medicals."

Runyon introduced the November 13, 2011, Form 107-I medical report of Dr. James C. Owen. Pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Owen assessed a 14% impairment for the shoulder and back injuries. Concerning the existence of an active impairment prior to the April 26, 2009, injury, Dr. Owen stated as follows:

> I have no information that indicates that any of this problem is preexisting active other than the one note on Dr. Patton's records, which may very well have referred to the prior one-month time period. Therefore, I do not think there was any evidence of preexisting active component.

KDMC introduced the November 28, 2012, independent medical evaluation ("IME") report of Dr. Russell Travis. With respect to the injury, Dr. Travis' impression was: 1) strain and sprain of the right shoulder

which had resolved. 2) Status post discectomy L5-S1 left performed by Dr. Ignatiadis on 2/20/10. 3) Complains of persistent low back and left lower extremity pain of undetermined etiology.

With respect to pre-existing low back problems, Dr. Travis stated as follows:

> It is also apparent from the medical records that Ms. Runyon had a previous history of low back and left lower extremity pain. She was seen in the Kings Daughters Medical Center on 1/9/09 for acute leg 'strain.' Because of pain in the left lower extremity she was diagnosed with acute LLE pain. An ultrasound revealed no evidence of DVT. On 1/11/09 a note recorded left leg pain of 5/10, LLE pain x5 days, intermittent sharp. Noted no acute trauma. On 1/12/09 a Catlettsburg Family Care Center assessment form stated CO pain in L leg x5 days. LLE pain x5 days. Been in EDx2, given Lortab with little relief, US negative for DVT.
>
> Perhaps more pertinent is the pain assessment tool on 1/12/09. It noticed pain in the left lower extremity of a 7/10 present, worse at 10/10. It was worse with walking and she had tenderness in the left sciatic notch.
>
> Diagnosis was L sciatica. She was placed on Skelaxin and Prednisone.
>
> In fact, on 4/23/09, just 3 days prior to the 4/26/09 injury at work she was seen by Dr. Patton and noted, 'Back pain worse, radiating down bilateral legs. Noted low back pain x3 weeks. Positive bilateral radiculopathy,

> positive insomnia secondary to pain.' A pictogram on that date showed marks in the lumbar area, down the entirety of both lower extremities posteriorly and noted tingling needles and pins at times. Assessment again was lumbar, thoracic sprain/strain. She was placed on Zanaflex, Lortab 10mg q 6 h and a MRI was to be obtained.
>
> The reason the MRI wasn't obtained apparently is because she claimed the injury on 4/26/09 and a subsequent MRI was delayed after that injury.
>
> The subsequent MRI, which was obtained on 5/2/09 was done for clinical indication 'Low back pain with bilateral lower extremity pain. Mostly left leg pain.' The low back pain and bilateral lower extremity pain is the identical symptoms to which she was complaining when seen on 4/23/09 and the lumbar MRI was ordered.

As to whether Runyon had a pre-existing active condition and an impairment rating prior to the subject work injury, Dr. Travis opined as follows:

> I did not evaluate Ms. Runyon prior to the work injury of 4/26/09 and therefore would not feel comfortable making an impairment rating. I would state that she did have complaints of low back pain and pain in the lower extremities, which would classify as a radiculopathy if she had objective findings to confirm that. If that be the case then she would be a DRE Lumbar Category III for the 10 to 13%, however, as I noted I didn't examine Ms. Runyon prior to this date.

With regard to an impairment rating, Dr. Travis stated as follows:

> My impairment rating for her would be a DRE Lumbar Category III 10%. Even though a DRE Lumbar Category III carries a 10 to 13% range the authors of the 5th Edition Guides are very clear on Page 381 when one uses the higher percentage. The authors state, 'If residual symptoms or objective findings impact the ability to perform ADL's in spite of treatment the higher percentage in each range should be assigned.' It is obvious to met [sic] his [sic] lady has had a baby, she take [sic] care of a 1 year old baby and her examination today would indicate no inability to perform the activities of daily living and confirmed by a normal EMG/NCV and a MRI post-op 10/27/12, which showed no evidence of residual or recurrent disc and no evidence of neural entrapment. Therefore she would be a DRE Lumbar Category II for 10%.
>
> As I noted Ms. Runyon's impairment rating at this time having had a discectomy L5-S1 left would be a DRE Lumbar Category II 10%. However, this clearly was a pre-existing symptomatic problem and a MRI was ordered just 3 days prior to the event of 4/26/09. Accordingly I would award at least 75% of this to pre-existing symptomatic problem of low back and pain in both lower extremities. Ms. Runyon states it was worse after this incident and I would award 25% to the incident of 4/26/09.

KDMC also introduced the February 21, 2011, IME report and the December 17, 2012, letter of Dr. Jerry

Scott. In the February 21, 2011, report, Dr. Scott concluded as follows:

> Based upon the above history and physical examination, it is my reasoned medical opinion that the claimant has a history of chronic low back pain with degenerative disease which at least to some degree preexisted this claim. She also has a history of right shoulder sprain/strain, having had a negative MRI and no evidence of impingement on today's examination.

After assessing an impairment rating for Runyon's condition, Dr. Scott stated:

> Please note that, in my opinion, it would be appropriate to apportion some of the claimant's lumbosacral impairment to pre-existing disease. To give a more objective basis for apportionment, the claimant's old records with regard to restricted range of motion or any studies indicating disk disease would be of benefit. Therefore, the calculations with regard to apportionment are not included today but could be calculated if those records are made available. Again, in my opinion, apportionment is indicated as the claimant's complaints with regard to her lower extremities and low back obviously predate this claim. In fact, the claimant had been diagnosed with radiculopathy and degenerative disk disease prior to this claim.

In the December 17, 2012, letter, Dr. Scott indicated he had previously requested any other medical records; however, no other records were provided. Utilizing the DRE method of the AMA Guides, Dr. Scott

assessed a 13% impairment. However, based on the range of motion model, he assessed a 15% impairment. Consequently, he provided the following regarding apportionment of his impairment rating:

> In my opinion, given the absence of other records, it is appropriate to apportion the DRE impairment as follows: The 8% whole person impairment should be apportioned to the pre-existing condition and the 5% whole person impairment remaining apportioned to the 4/26/2009 condition.
>
> . . .
>
> If the degree of range of motion limitation which was mentioned by Dr. Patton in her 4/4/2009 office note was known precisely, that could be subtracted from the 5% whole person impairment I determined in my 2/21/2011 evaluation for range of motion deficit.

With respect to the issue on appeal, in the April 8, 2013, opinion, award, and order, the ALJ entered the following findings of facts and conclusions of law:

> Both parties acknowledge the occurrence of a work-related injury. The point of contention arises around the question of whether Plaintiff's permanent impairment resulted from the work incident <u>or</u> whether her current permanent impairment is partially attributable to a pre-existing active condition or impairment. The Plaintiff argues that she did not have a prior "active" impairment as defined by the applicable statute and case law. The Defendant argues that Plaintiff was suffering from a pre-existing active

condition that contributed to her impairment rating. The question of the statutory multipliers under KRS 342.730 is also in dispute.

Dr. Owen's report carefully details the method used by him in arriving at his 14% permanent impairment rating. He attributes all of the impairment to the effects of the work-related injury and found no pre-existing active condition. He indicated that he is aware of the usual and customary work activities of the Plaintiff (as an LPN) and he acknowledged that the lifting or assisting of patients in odd positions was customary. He opined that Plaintiff does not retain the capacity to return to the type of work she was doing at the time of her work-related injury. In fact, he stated "she clearly would not be able to return to the type of work performed at the time of injury." Dr. Owen recommended restrictions against lifting, handling, and carrying objects greater than twenty pounds, and that she should avoid activity overhead that would require strength.

Although the ALJ has considered the opinions of Dr. Travis and Dr. Scott, and has considered the argument by Defendant that Dr. Owen did not have an accurate history of the Plaintiff's prior medical treatment, the ALJ is still most persuaded by the evidence presented by Dr. Owen. It must be remembered that the Kentucky Supreme Court has determined that to characterize a previous condition as "active," it must be both symptomatic and impairment ratable under the AMA Guides, 5th Edition, immediately prior to the occurrence of the work-related event. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007). The defendant

> has the burden of proof as to the existence and the rating of the pre-existing condition. The ALJ agrees with Plaintiff that the "carving out" of an existing impairment for a pre-existing active condition is not really sufficient. The ALJ believes that Finley, supra, requires that Defendant show proof of an actual pre-existing impairment that was active and in existence prior to the work injury. There should be proof of a ratable impairment of the condition that is claimed to be pre-existing "active" by the Defendant-Employer. Although the evidence is clear that Claimant had complained of prior shoulder pain and had received treatment for both shoulder and low back pain, there is no evidence that the existence of such pain rose to the level of an actual impairment. The Plaintiff was fully and successfully performing all of her job duties prior to the work-related incident. She was under no restrictions or limitations in the performance of her duties.
>
> Further, it must be remembered that our Kentucky Supreme Court has determined that a dormant, non-disabling, pre-existing condition is compensable under the Act if a work-related injury causes it to become symptomatic. McNutt Construction/First General Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001).

KDMC filed a petition for reconsideration making the same argument it makes on appeal that the ALJ erred in his application of Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007).

In overruling the petition for reconsideration, the ALJ stated, in relevant part, as follows:

> Respectfully, the ALJ strongly disagrees with Defendant-Employer's interpretation of the Opinion. The ALJ cited Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007) for the proposition that the defendant has the burden of proof as to the existence and the rating of a pre-existing active condition. In order for an impairment to be 'active' it must be both symptomatic and impairment ratable under the AMA Guides, 5th Edition. The finding that: 'The Plaintiff was fully and successfully performing all of her job duties prior to the work-related incident. She was under no restrictions or limitations in the performance of her duties.' (p. 10 of the Opinion), is merely one of the factors the ALJ considered in determining whether or not the pre-existing condition was symptomatic and impairment ratable. The ALJ did not state, or even suggest, that the Plaintiff must be under work restrictions or working limited duty due to the prior condition at the time of the work event in order to be found to have an 'active' impairment.

On appeal, KDMC again argues the ALJ applied the incorrect legal standard in determining whether Runyon suffered a pre-existing active condition. KDMC maintains that in proving a prior condition was active it was not required to show Runyon was under work restrictions or was working limited duty prior to the injury. Rather, KDMC asserts Finley v. DBM Technologies, supra, requires that it

show Runyon was symptomatic and had a ratable impairment at the time of the injury. KDMC argues although it made this showing through the opinions of Drs. Travis and Scott, the ALJ required more. Accordingly, KDMC requests the decision be reversed and remanded to the ALJ "for a determination of whether [Runyon] suffered a preexisting active condition and exclude the same."

In Finley v. DBM Technologies, supra, the Court of Appeals stated a pre-existing condition is deemed active, and therefore not compensable, if it is "symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." Id. at 265. Moreover, as an affirmative defense, the burden to prove the existence of a pre-existing active condition falls on the employer. Id. Since KDMC was unsuccessful in its burden, the question on appeal is whether the evidence compels a different result. 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 by the ALJ are so unreasonable

under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d (Ky. 1979). The ALJ 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 Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481

(Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

We believe the ALJ applied the correct standard in determining whether Runyon had a pre-existing active condition. The ALJ's statement he "agrees with [Runyon] that the 'carving out' of an existing impairment for a pre-existing active condition is not really sufficient" is somewhat confusing. However, the ALJ correctly stated KDMC must show proof of an actual pre-existing impairment that was active and in existence prior to the work injury. Additionally, the ALJ correctly stated there should be proof of a ratable impairment for the claimed active condition. In determining a carve out for a pre-existing condition was not required, the ALJ concluded there was no evidence Runyon's pain "rose to the level of an actual impairment" and she was "fully and successfully performing all of her job duties" and "was under no restrictions or limitations in the performance of her duties" prior to the work injury. Those factors are appropriate considerations in determining whether Runyon's condition was both symptomatic and impairment ratable immediately prior to the April 26, 2009, injury. The ALJ concluded Runyon's

condition was not symptomatic prior to the injury; therefore, she did not have an active condition as defined by Finley v. DBM Technologies, supra.

We acknowledge the December 8, 2009, record of Dr. Patton reflects the following history:

> The history is provided by the patient. This is a chronic problem. The current episode started more than 1 year ago. The problem occurs constantly. The problem has been gradually worsening. The pain is associated with lifting heavy object [sic]. The pain is present in the lumbar spine and sacro-iliac. The pain quality is described as stabbing, shooting and aching. The pain radiates to the left thigh, left knee and left foot. The pain is at a severity of 8/10. The symptoms are worsened by bending, twisting and position. The pain is same all the time. Stiffness is present in the morning. Associated symptoms include numbness and weakness. Pertinent negatives include no bowel incontinence, no bladder incontinence and no tingling. She has tried heat, bed rest, NSAIDs and analgesic for the symptoms.

Similarly, the January 12, 2009, and April 23, 2009, records of Catlettsburg Family Care Center reveal Runyon was seen and was diagnosed with left leg and low back pain.

Certainly these medical records are supportive of KDMC's contention Runyon had low back problems prior to the April 26, 2009, injury. However, Runyon testified at the hearing and at her deposition that she worked from 7:00

p.m. to 7:00 a.m. three days one week and four days the next, worked overtime every other week, and would work more if she was "called in." Regarding her prior back problems, Runyon testified as follows:

> A: I had a little bit of back pain before the accident, but it was just from lifting and tugging and normal everyday work. I don't know many nurses that don't have a little bit of back pain here and there. You go home, you sit on your heating pad for a little while and you go back the next day. I never missed any work over any type of back pain or anything.
>
> Q: You said that you had some left leg issues before that when you were having the back pain before the injury, too?
>
> A: Not really. I had –- my ankle would swell every now and then, but I think it was just from being on my feet so often. Both my ankles actually swelled at that –- at that time.
>
> Q: And this was before the injury?
>
> A: Yes.
>
> Q: Is that the time we're talking about?
>
> Did you treat for the back pain on a regular basis before the injury?
>
> A: I went to Dr. Patton one time and told her about it, that it was just getting on my nerves and -–
>
> Q: What kind of treatment did she give you for it?

> A: She -– she gave me some muscle relaxers, advised heat, and I think she gave me like ten pain pills to take if I needed them.
>
> Q: So when the injury occurred in April of 2009, were you still taking medication? Were you on medication that time?
>
> A: I was prescribed it; I wasn't taking it. I only took any, any kind of medication that could impair my abilities on days I was off.

Runyon also testified that her pain prior to the subject injury was very mild compared to the pain she experienced after the injury. She noted her prior back pain was higher up the back than the pain she experienced after the injury. She explained the muscle relaxers Dr. Patton prescribed for back spasms were prescribed to help her back muscles relax so she could sleep. Significantly, Runyon testified she missed no work as a result of her prior back condition.

At the hearing, Runyon's testimony was consistent with her deposition testimony. Her hearing testimony is as follows:

> A: I had a little bit of soreness in my lower back and some soreness in my lower left leg area, nothing that prevented me from working, just more an aggravation, just something I didn't want to deal with; but as a nurse you deal with back pain on a daily basis.

Runyon testified that prior to the subject injury she missed no work and her back condition did not limit her ability to perform her job.

Any concern the ALJ may have improperly applied the wrong standard is resolved by his order ruling on KDMC's petition for reconsideration. Therein, the ALJ stated he strongly disagreed with KDMC's "interpretation of the opinion." The ALJ acknowledged the standard as set forth in Finley v. DBM Technologies, supra. He pointed out his finding Runyon was fully and successfully performing all of her job duties before the incident and was under no restrictions and limitations in the performance of her duties was "merely one of the factors" he considered in determining whether her pre-existing condition was symptomatic and impairment ratable. The ALJ specifically denied stating or even suggesting in the April 8, 2013, opinion, award, and order "that [Runyon] must be under work restrictions or working limited duty due to a prior condition at the time of the work incident in order to be found to have an 'active' impairment." The ALJ's statements contained in the May 17, 2013, order overruling KDMC's petition for reconsideration firmly establish he understood the standard as set forth in Finley v. DBM Technologies, supra, and correctly applied it in

determining whether Runyon had a pre-existing active condition.

Finally, although not raised by KDMC, Dr. Owen's opinions standing alone or in conjunction with Runyon's testimony that she did not miss any work, her condition did not limit her ability to perform her job, and she regularly worked overtime prior to the April 26, 2009, event constitute substantial evidence supporting the ALJ's determination Runyon did not have a pre-existing active condition as defined by Finley v. DBM Technologies, supra. Given Runyon's testimony regarding her duties as an LPN and the job description KDMC filed in the record, the ALJ was free to conclude any pre-existing active low back condition would have prevented her from working twelve hour shifts three and four days a week along with overtime prior to the April 26, 2009, injury. As Runyon did not have any such problems during her twelve hour shifts and regularly worked overtime, the ALJ could logically conclude her low back condition was not symptomatic prior to April 26, 2009. Thus, there is ample evidence of substantial probative value to support the ALJ's conclusion that immediately prior to the work-related event, Runyon did not suffer from an active condition.

Because the ALJ's analysis comports with Finley v. DBM Technologies, supra, and the outcome selected by the ALJ is supported by the record, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

Accordingly, the April 8, 2013, opinion, award, and order and the May 17, 2013, order overruling KDMC's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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