Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 8, 2016

CLAIM NO. 200997826

LKLP CAC, INC. PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

BRANDON FLEMING
and HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. LKLP CAC, Inc. ("LKLP") seeks review of the June 16, 2015, Opinion, Award, and Order of Hon. R. Roland Case, Administrative Law Judge ("ALJ") finding Brandon Fleming ("Fleming") suffered a worsening of his work-related physical and psychological conditions and awarding increased permanent partial disability ("PPD")

benefits. LKLP also appeals from the July 22, 2015, Order denying its petition for reconsideration.

On appeal, LKLP challenges the ALJ's reliance upon its medical expert, Dr. John Vaughan, in determining Fleming's physical condition has worsened. Alternatively, it argues remand is necessary for more specific findings of fact pertaining to Fleming's worsened physical condition. LKLP does not challenge the ALJ's decision Fleming's psychological condition worsened.

On July 30, 2010, Hon. James L. Kerr, Administrative Law Judge ("ALJ Kerr") entered an opinion and award finding Fleming sustained a work-related injury on October 22, 2007.[1] Fleming underwent a discectomy and spinal fusion at the L5-S1 level performed by Dr. Duane Densler. Relying upon the opinions of Dr. David Herr, ALJ Kerr found Fleming retained a 13% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") due to the physical injury. Relying upon the opinions of Dr. Robert Granacher, ALJ Kerr determined Fleming retained a work-related 5% psychological impairment rating. Pursuant to the AMA Guides, the

[1] On that date, Fleming was involved in a motor vehicle accident ("MVA").

impairment ratings yielded a combined impairment rating of 17%. ALJ Kerr's decision was not appealed.

On March 26, 2014, Fleming filed a motion to reopen alleging his physical and psychological conditions arising from the work injury have worsened. In support of this assertion, Fleming submitted his affidavit and relied upon the 47% impairment rating assessed by Dr. Jerry Brackett for the physical injury and a 12% impairment rating assessed by Dr. Megan Green for the psychological injury.

On May 29, 2014, Hon. J. Landon Overfield, former Chief Administrative Law Judge, sustained the motion to reopen to the extent the claim would be assigned to an Administrative Law Judge for further adjudication.

During the proceedings before the ALJ, Fleming also introduced the report of Dr. Bruce Guberman, who assessed an additional 15% impairment rating for the physical injury over and above the 13% impairment rating found by ALJ Kerr.

LKLP introduced the report and deposition of Dr. Vaughan who assessed a 23% impairment rating pursuant to the AMA Guides for Fleming's physical injury which he opined he would have assessed on March 24, 2009, when Fleming attained maximum medical improvement ("MMI").

Concerning whether Fleming's physical condition has worsened, in the June 2015 decision the ALJ provided the following analysis and conclusions in determining Fleming currently has a 23% impairment rating due to his physical injury:

> The Administrative Law Judge has carefully reviewed all the evidence of record and after doing so concludes as the original Administrative Law Judge did that the plaintiff is not totally disabled. The plaintiff is still a younger individual with a college education and the FCEs indicate an ability to do at least light work. The ability to do light work when considered with the plaintiff's age and education would indicate the plaintiff is not totally disabled as defined by the Act. Hence, the issue becomes has the plaintiff suffered a change of condition increasing his permanent partial disability.
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> The Administrative Law Judge in the original claim found the plaintiff had a 13% physical impairment. This finding is res judicata. The Administrative Law Judge has reviewed the medical evidence and is persuaded by the IME report done at the request of the defendant-employer that the plaintiff now has a 23% impairment rating. The impairment rating of Dr. Brackett is rejected since it includes impairment ratings for the thoracic and cervical area. Dr. Guberman assessed a 15% impairment but after comparing the reports of Dr. Guberman and Dr. Vaughn, the Administrative Law Judge is persuaded by the report of Dr. Vaughn that the plaintiff has a 23% impairment rating. Since the plaintiff only had a

> 13% rating at the time of the original opinion and now has a 23% impairment, there has obviously been an increase in his impairment and the Administrative Law Judge will so find. As previously indicated the findings of the 13% impairment in the original opinion is res judicata and the defendant cannot now argue that he actually had a 23% impairment the whole time.

Relying upon the opinion of Dr. Green, the ALJ found Fleming has a 12% impairment rating due to the psychological work injury. The ALJ provided the following concerning Fleming's increased benefits:

> Based on the foregoing, the Administrative Law Judge finds the plaintiff has suffered a change of his condition and his physical impairment has increased from 13% to 23% and his psychological impairment has increased from 5% to 12% and based on the combined values chart, the plaintiff's combined impairment has increased from 17% to 32%. A 32% impairment has a multiplier of 1.5. The plaintiff is also entitled to the 3 multiplier. This would result in more than 100% and the plaintiff would therefore be entitled to 99% of two-thirds (2/3) of his average weekly wage. The plaintiff's average weekly wage was $598.40 multiplied by two-thirds (2/3) renders a figure of $398.93, which then must be multiplied by 99% and the plaintiff's new permanent partial rate would therefore be $394.95. This rate can only begin from the date the Motion to Reopen was filed on March 26, 2014

> and will run for 425 weeks from and after December 3, 2008.[2]

LKLP filed a petition for reconsideration contending Dr. Vaughan's findings do not establish a worsened condition. Significantly, LKLP did not request additional findings of fact concerning the ALJ's determination of a worsened physical condition. Rather, it requested the ALJ enter an order modifying his decision to reflect there was no change in the physical impairment. By Order dated July 22, 2015, the ALJ overruled LKLP's petition for reconsideration.

LKLP now contends the ALJ's finding Dr. Vaughan's opinion regarding the applicable impairment rating is most persuasive while also finding the report of Dr. Vaughan sufficiently established a worsening of condition is "wholly improper." LKLP asserts the ALJ acted outside his authority in determining Fleming has a worsened physical condition without citing to any proof in the record in support of his determination. It notes Dr. Vaughan indicated Fleming had reached MMI prior to ALJ Kerr's decision. It contends the ALJ erroneously relied upon Dr. Vaughan's impairment rating without making a specific finding as to when Fleming reached MMI. LKLP contends the

[2] The ALJ also resolved three medical fee disputes in favor of LKLP.

ALJ provided no analysis in support of his acceptance of Dr. Vaughan's impairment rating.

LKLP notes Dr. Vaughan stated his findings would have been the same had he examined Fleming in 2009. LKLP contends although Dr. Vaughan's impairment rating is a higher impairment, it does not represent an "increase" or "worsening." LKLP maintains since a worsening was not established, a finding of a greater impairment rating is an improper re-adjudication of a decided issue. It concludes by arguing as follows:

> The finding of a worsening of physical condition is both arbitrary and capricious, as defined herein. The ALJ found a worsening occurred, although no date of MMI was given. The ALJ relied upon the findings of Dr. Vaughan as to impairment, but gave no analysis as to why Dr. Vaughan's findings as to the date of MMI were incorrect, as they would necessarily have to be to establish a worsening of condition. The finding was also capricious as it stands in contradiction to the evidence most-persuasive to the ALJ. Based on the foregoing, the finding of a physical worsening was completely improper and outside the scope of judicial authority. Therefore, the Petitioner/Employer moves that the finding of a physical worsening be vacated.

Alternatively, LKLP requests remand with instructions to the ALJ to provide additional findings of

fact which support the determination of a worsened physical condition after July 30, 2010. Citing to Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982), it argues remand is necessary because the ALJ failed to state with specificity which evidence he relied upon in finding a worsening of Fleming's physical condition. We affirm.

In his June 30, 2014, report, Dr. Vaughan set forth Fleming's treatment history following his work-related MVA. Dr. Vaughan conducted a physical examination and reviewed the CT scan of the lumbar spine dated December 11, 2012. His impression was right-sided lower back pain and radicular pain in the right leg. He diagnosed degenerative disc disease at L5-S1 with radiculopathy, and status post spinal fusion at L5-S1 with pedicle screws and interbody fusion cage. Concerning an impairment rating, Dr. Vaughan stated as follows:

> In historical hindsight, if asked what his impairment rating after the injury of 2007 and before his surgery of 2008, I would have rated him a DRE Category III which would be 13% to the body as a whole. By virtue of the fact he had a lumbar fusion in 2008, I think his rating after the fusion surgery would increase to 23%. This is a DRE Lumbar Category IV impairment. After his fusion surgery in 2008 I therefore think his impairment rating was 23% to the body as a whole. In historical

> hindsight, if asked on 7/30/10 what his impairment rating was, I would say it would be 23%. That is what I think his impairment rating is today. I do not think it has changed. There is no objective reason that his impairment rating would increase or decrease. I think his impairment rating today is 23% to the body as a whole, which is for a lumbar fusion L5-S1.
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> His back surgery was performed on September 24, 2008. I believe he reached maximal medical improvement 6 months following his back surgery, or on 3/24/09.

During his December 5, 2014, deposition, Dr. Vaughan again stated Fleming reached MMI on March 24, 2009. At that time, Fleming had a 23% permanent impairment rating pursuant to the AMA Guides. Pursuant to the AMA Guides, a single level successful arthrodesis falls within DRE Category IV. By virtue of the fact Fleming had a single level fusion his impairment rating ranges between 20% and 23%. Dr. Vaughan explained because Fleming had a lot of persisting symptoms and some decreased range of motion in his back the impairment rating was assessed "on the high side." Dr. Vaughan specifically noted when he examined Fleming in June 2014 the impairment rating he would have assessed in 2009 had not changed. Dr. Vaughan stated Fleming's impairment rating on March 24, 2009, and on June 30, 2014, is 23%.

Upon reopening, Fleming had the burden of proof to establish he had sustained a worsening of his physical injury. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Fleming was successful in that burden, the question on appeal is whether there is substantial evidence of record to support 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).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). 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).

Contrary to LKLP's assertion, the impairment rating of Dr. Vaughan may be relied upon by the ALJ in determining Fleming now has a 23% impairment rating as a result of his work injury and his physical condition has worsened. As previously noted, the ALJ may rely upon Dr. Vaughan's impairment rating while giving no credence to Dr. Vaughan's opinion there has been no worsening of

Fleming's condition since July 30, 2010, the date ALJ Kerr rendered his award.

In Gipson Farms Trucking, LLC v. Johney Ballard, 2009-CA-001784-WC, rendered April 9, 2010, the Court of Appeals dealt with this issue explaining:

> In August of 2008, Ballard filed a motion to reopen his claims. ALJ Grant Roark heard this claim. Ballard argued that his physical condition had worsened and that there was an increase in his occupational disability. The only medical impairment rating presented was that of Dr. Richardson, who assessed Ballard as now having a 20% whole person impairment. Dr. Richardson also believed that Ballard would never be able to return to gainful employment.
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> . . .
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> Gipson argues that there was no proof that Ballard's condition had worsened. Gipson claims that Ballard's testimony regarding his condition was the same as it was in the original action and that Ballard has always felt he was permanently and totally disabled. Also, Gipson points out that Dr. Richardson gave Ballard an impairment rating of 21% in the original action, but only gave him a rating of 20% upon the reopening. Gipson argues this shows an improvement in Ballard's condition, not a worsening.
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> We begin by noting that the difference in the two Dr. Richardson ratings is irrelevant. In the eyes of the law, once Ballard was determined to have an 8% impairment rating by the

> original ALJ and Board, that was the impairment rating to be used in all further actions. The 8% impairment rating is entitled to *res judicata*. *See Godbey v. University Hospital of Albert B. Chandler Medical Center, Inc.*, 975 S.W.2d 104 (Ky. App. 1998); *Keefe v. O.K. Precision Tool & Die Co.*, 566 S.W.2d 804 (Ky. App. 1978).

Slip Op. at 2-3.

In the case *sub judice*, ALJ Kerr's determination that as of July 30, 2010, Fleming retained a 13% impairment rating as a result of his physical injury is *res judicata*. Thus, Dr. Vaughan's opinion that Fleming now has a 23% impairment rating is proof of a worsened condition. Further, the ALJ was free to disregard Dr. Vaughan's opinion there had been no worsening of Fleming's condition between the date he attained MMI in 2009 and June 30, 2014, when he first examined him.

When the ALJ accepted Dr. Vaughan's impairment rating, he was not required to further explain why he found there had been a worsening of Fleming's condition as "a greater permanent impairment is objective medical evidence of a worsening of impairment." Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 218 (Ky. 2006). Similarly, the ALJ need not address when Fleming attained MMI as Dr. Vaughan provided the date of MMI. Once the ALJ determined Fleming had an increased impairment rating of

23%, he was not required to engage in additional fact findings as to whether there had been a worsening of Fleming's physical condition since a finding of increased impairment rating is *per se* evidence of a worsened condition. Central to the ALJ's inquiry was whether Fleming's impairment rating is now greater than the 13% impairment rating found by ALJ Kerr. Since ALJ Kerr determined Fleming had a 13% impairment rating as a result of the physical injury, Dr. Vaughan's 23% impairment rating is objective medical evidence of a worsened condition/impairment.

We find no merit in LKLP's alternative argument the claim should be remanded to the ALJ for more specific findings of fact regarding the worsening of Fleming's physical condition. Since LKLP did not request the ALJ provide additional findings of fact in its petition for reconsideration, it waived its right to request on appeal that the claim be remanded for additional findings of fact.

The ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W. 2d 47 (Ky. App.

1988); Shields v. Pittsburgh and Midway Coal Mining Co., supra. This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W. 2d 526 (Ky. 1973).

In the case *sub judice*, the ALJ sufficiently provided the basic facts upon which his ultimate conclusion was drawn and no additional fact finding is needed. This is particularly true since LKLP did not seek additional findings of fact post-award. Further, additional findings of fact appear unnecessary in light of the ALJ's reliance upon the impairment rating of LKLP's medical expert in determining Fleming had a worsened physical condition.

Accordingly, the June 16, 2015, Opinion, Award, and Order and the July 22, 2015, Order ruling on the petition for reconsideration are **AFFIRMED**.

RECHTER, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FILES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I respectfully dissent. The ALJ clearly based his opinion upon Dr. Vaughn's opinion Fleming has a 23% impairment, which is the same rating he opined was present on July 30, 2010 when the ALJ awarded PPD benefits. Dr. Vaughn specifically stated Fleming's impairment rating has not increased since July 30, 2010 the date of the original decision. Therefore, the ALJ's determination of an increase in PPD benefits is not supported by the evidence. In order for there to be an increased award, there must be a determination of increased of impairment. Since the rating assessed by Dr. Vaughn is the same now as it would have been in July 2010, and because he specifically testified there was no increased impairment, the ALJ's determination is not supported by substantial evidence, and I would reverse his decision.

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