Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 13, 2015

CLAIM NO. 201499446

LEON MCQUEEN PETITIONER

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

NELSON TREE SERVICE
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

RECHTER, Member. Leon McQueen ("McQueen") appeals from theApril 27, 2015 Opinion and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), and the May 29, 2015 Order denying his petition for reconsideration. McQueen alleged he sustained a neck and back injury on December 17, 2013. The ALJ determined

McQueen had failed in his burden of proving a work-related injury, and dismissed the claim. McQueen now appeals, arguing the ALJ failed to consider the totality of the evidence. For the foregoing reasons, we affirm.

McQueen began working for Nelson Tree Service in 2011 as a grounds man, and was later promoted to foreman for the climbing crew. He testified he was cutting brush on December 17, 2013, and tripped while climbing through a broken fence. He immediately felt a pinching sensation in his neck and back. He continued working but the pain worsened, so he informed his boss. As he climbed a hill to leave the worksite, he fell again, which increased his pain. McQueen was taken to St. Joseph's Hospital by the general foreman. He was treated for a shoulder and back strain and released.

For the next six months, McQueen was referred to and evaluated by several physicians, all of whom treated him conservatively. Dr. Patrice Beliveau evaluated McQueen for complaints of left shoulder pain. Dr. Beliveau ordered a shoulder MRI which revealed mild degenerative changes of the AC joint and humeral head, with no rotator cuff tear. Dr. Beliveau recommended physical therapy and light duty work. McQueen was also referred to Dr. Amr El-Naggar for evaluation of his back pain. Dr. El-Naggar, a neurosurgeon,

ordered a cervical MRI which revealed mild degenerative disc disease at C4-5. Dr. Magdy El-Kalliny, Dr. El-Naggar's colleague, diagnosed low back and neck pain, and lumbar radiculopathy.

Meanwhile, McQueen also treated with Dr. Chad Morgan, a chiropractor, and his primary care physician. He was seen for a follow-up with Dr. Beliveau on February 17, 2014, and reported improvement in his shoulder pain but numbness and tingling in his extremeties. He demonstrated normal range of motion, rotation and strength. Dr. Beliveau diagnosed a resolved left shoulder strain at this visit, and recommended continued home exercises to maintain shoulder function. On July 16, 2014, McQueen visited Dr. Alam Khan for pain and numbness in his arms and legs. Dr. Khan conducted an EMG and NCV study, which indicated mild sensory neuropathy affecting the upper and lower extremities.

Dr. David Jenkinson conducted an independent medical evaluation ("IME") on April 2, 2014. Dr. Jenkinson reviewed McQueen's medical records and performed a physical evaluation, but found no objective abnormality to support a specific diagnosis. He opined McQueen may have suffered a minor contusion to the left shoulder, but suffered no structural injury. Dr. Jenkinson also suspected self-

limiting behavior. He assigned a 0% impairment rating and opined McQueen was at maximum medical improvement.

Dr. Jeffrey Uzzle conducted an IME on June 15, 2014. Dr. Uzzle diagnosed cervical radiculitis, chronic cervical sprain/strain, and chronic lumbar sprain/strain. He attributed these diagnoses to McQueen's work injury, and opined he was not yet at maximum medical improvement. In a second IME conducted October 24, 2014, Dr. Uzzle noted mild range of motion limits in the neck, back and left upper extremity. His diagnosis remained the same, and he opined McQueen was now at maximum medical improvement. He assigned a 10% impairment rating.

Temporary total disability benefits were paid from January 28, 2014 through April 17, 2014. Medical expenses were also paid in the amount of $6,498. However, Nelson Tree Service initiated a medical fee dispute to contest the necessity of the cervical spine MRI. It introduced the utilization reports of Dr. John Neminaitis and Dr. Darrell Thomas, both of whom opined the MRI was not medically necessary.

The ALJ concluded "the objective medical evidence simply does not support [McQueen's] claim of a permanent work-related injury." To reach this conclusion, he relied on Dr. Jenkinson's opinion and the results of the cervical

MRI, which revealed no evidence of significant nerve root compression. The ALJ also noted even Dr. Uzzle found only mild limited range of motion, which Dr. Jenkinson attributed to symptom magnification. He thus concluded “there is no objective evidence to indicate [McQueen] had any significant abnormality in his neck or shoulder.”

McQueen petitioned for reconsideration, asking the ALJ to reconsider his finding he had suffered a temporary injury rather than a permanent injury. He also requested additional findings of fact as to the ALJ’s reliance on Dr. Jenkinson’s opinion. The ALJ denied the petition.

On appeal, McQueen argues Dr. Jenkinson’s report, especially his suspicion of self-limiting behavior, is not reflective of his current condition. He points to the fact he is still being treated on an as-needed basis by Dr. Beliveau, his abnormal cervical MRI, and his abnormal EMG/NCV study, which was conducted after Dr. Jenkinson’s IME. McQueen thus asserts the ALJ failed to consider the totality of the evidence in concluding he suffered no permanent injury.

We find no indication the ALJ failed to consider the totality of the proof. The ALJ summarized all of the medical proof, and McQueen has identified no specific discrepancy between the medical records and the ALJ’s

summation. Furthermore, the ALJ accurately reviewed Dr. Jenkinson's report. While McQueen may disagree with Dr. Jenkinson's opinion, the ALJ was free to rely upon the statements therein.

McQueen's arguments on appeal essentially request this Board to reweigh the evidence in his favor, which we are not permitted to do. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Because McQueen was unsuccessful in carrying the burden of proof as the claimant, the only question on appeal is whether the totality of the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Conflicting evidence was presented which did not compel a particular result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). As fact-finder, the ALJ enjoys the discretion to choose which evidence upon which to rely. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). We discern no abuse of that discretion.

Therefore, the April 27, 2015 Opinion and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, as well as the May 29, 2015 Order denying petition for reconsideration, are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON. MCKINNLEY MORGAN
921 S MAIN ST
LONDON, KY 40741

COUNSEL FOR RESPONDENT:

HON. BARRY LEWIS
PO BOX 800
HAZARD, KY 41702

ADMINISTRATIVE LAW JUDGE:

HON. JONATHAN R. WEATHERBY
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601