

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 15, 2013

CLAIM NO. 201173034

MARTIN JOHN WURTH

PETITIONER

VS.

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

RIVER VIEW COAL, LLC  
and HON. EDWARD D. HAYS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Martin John Wurth ("Wurth") seeks review of the opinion, award and order rendered May 20, 2013 by Hon. Edward D. Hays, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for a work-related low back injury sustained on

September 26, 2011 while employed by River View Coal, LLC ("River View"). Wurth also seeks review of the July 8, 2013 order denying his petition for reconsideration.

On appeal, Wurth argues the ALJ erred in finding Dr. Harold Cannon was not aware of his prior low back treatment history. Likewise, he argues the ALJ erred in finding Wurth enjoyed an extremely good recovery following his work injury. Wurth also argues the ALJ erred in relying upon the opinion and records of Drs. Robert Sexton and Anthony Starkey in apportioning 6% of his impairment rating to an active pre-existing condition. We disagree and affirm because substantial evidence exists supporting the ALJ's decision and no contrary result is compelled.

Wurth filed a Form 101 alleging he injured his low back on September 26, 2011 while "welding on a miner putting bit block on" while working as a roving mechanic. He subsequently underwent a microlumbar discectomy and lateral recess release at L4-5 performed by Dr. Cannon on November 22, 2011. It is undisputed Wurth did not work from September 27, 2011 through January 21, 2012. It is also undisputed Wurth returned to his position as a roving mechanic with River View on January 22, 2012 earning the same or greater wages. The parties also stipulated Wurth

retains the physical capacity to return to the type of work he performed at the time he was injured.

Wurth testified by deposition on November 27, 2012 and at the hearing held on March 21, 2013. Wurth is a high school graduate and has specialized training in welding. Wurth began working for River View as a mechanic in November 2009 and continues to work in this capacity. Prior to the work injury, Wurth maintained a perfect attendance record with River View which he has maintained since returning to work in January 2012.

On September 26, 2011, Wurth was on his knees putting bit blocks on a miner. As he grabbed the drum and pulled up, he felt immediate numbness, pain and a burning sensation in his low back and right leg. Wurth denied experiencing this type of pain before. Despite his symptoms, Wurth completed his shift and drove home. He could not get out of bed the next morning due to his pain. He was transported by ambulance to the Madisonville emergency room. An MRI was ordered, and his family physician referred him to Dr. Cannon who recommended low back surgery. The surgery was delayed until November 22, 2011 because of approval by the workers' compensation insurer. Wurth last treated with Dr. Cannon in January 2012, when he was released to return to work. Wurth stated

Cannon restricted him to being careful when lifting and from "snatching and grabbing." He recommended Wurth use "come alongs" at work to assist in lifting heavy items. Wurth could not recall whether Dr. Cannon was aware of his prior treatment history with Dr. Starkey. Wurth denied experiencing pain down his right leg prior to September 26, 2011, despite Dr. Starkey's records indicating otherwise.

Wurth currently experiences low back discomfort, aches and stiffness. Wurth testified he returned to his former job in January 2012, and he can basically perform all his prior duties, but it takes him longer to complete tasks and he can no longer "snatch and grab." Wurth stated he can no longer jump on a trampoline with his children due to his work injury. Wurth estimates he currently takes up to five Lortab per week for his back pain.

Wurth admitted he "somewhat" experienced low back pain prior to the work injury, but could not recall when he first noticed it. He explained all coal miners have back pain. He admitted he treated with Dr. Starkey, a physician and chiropractor, from 2008 through 2011, for low back complaints. Dr. Starkey performed adjustments and prescribed Lortab, but never ordered diagnostic studies. Wurth testified he went to Dr. Starkey for low back pain, which did not radiate into his buttocks and legs. At the

hearing, Wurth disputed the number of office visits made to Dr. Starkey. Wurth estimated immediately prior to the September 26, 2011 work accident, he was taking two to three Lortabs a day, but never missed work due to his prior back pain. Wurth did not continue to treat with Dr. Starkey following the September 26, 2011 work accident.

Melanie Wurth ("Melanie"), Wurth's wife, also testified at the hearing. She confirmed Wurth returned home from work on September 26, 2011, and could hardly walk or get up and down. She had never seen him in this type of pain before. Melanie denied Wurth has experienced similar back problems or exhibited physical limitations prior to the September 26, 2011 incident. Since the injury and surgery, Melanie testified Wurth can no longer play softball or basketball with his children, jump on the trampoline, weed-eat or mow the yard, or drive prolonged periods of time like he did prior to the accident. Wurth agreed with his wife regarding his current physical limitations.

Melanie also testified she accompanied her husband to the evaluation performed by Dr. Sexton. She stated the interview lasted thirty-two minutes and the examination lasted only eleven minutes. Wurth agreed with his wife concerning the length of Dr. Sexton's evaluation.

In support of his claim, Wurth filed the records of Dr. Nhan Nguyen, Dr. Cannon and his physician's assistant, A. John Umbach III, and from the Webster County Ambulance Services. On September 27, 2011, Wurth was transported by ambulance to the emergency room after reporting severe back pain and the inability to get up. On September 29, 2011, Wurth went to his family physician, Dr. Nguyen, complaining of severe low back pain radiating down to his legs, and right leg numbness which began on Monday after he got off work. Dr. Nguyen diagnosed low back pain with right radiculopathy and paresthesia, and ordered a lumbar MRI.

Wurth first saw Dr. Cannon on October 12, 2011, complaining of low back and right leg pain with numbness beginning three weeks prior while at work. Dr. Cannon noted Wurth "has had no prior episodes such as this." He reviewed the MRI which demonstrated "large central disc extrusion the severe stenosis with sac measuring 4 millimeters." Dr. Cannon diagnosed bilateral radiculopathy with severe stenosis and recommended "MLD L4-5." The November 22, 2011 post-operative report reflects Dr. Cannon performed a right 4-5 microlumbar discectomy with lateral recess release.

Wurth followed up with Mr. Umbach on at least two occasions. On January 4, 2012, Mr. Umbach noted Wurth is

doing well following the surgery and continues to have no leg pain. He recommended Wurth return to work eight weeks following surgery and to follow up on an as-needed basis. Wurth also followed up with Dr. Nguyen. On July 16, 2012, Dr. Nguyen noted Wurth's back pain has "significantly improved after surgery . . . but continues to have limiting muscle pains and aches, especially when he bends over and does any heavy lifting or pulling" and prescribed Lortab.

In a July 28, 2012 letter, Dr. Cannon reviewed Wurth's low back work injury and treatment, including the surgery. Dr. Cannon stated Wurth's last office visit occurred on January 4, 2012, in which "he was doing well and had no neurological deficits postoperatively." Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, ("AMA Guides") Dr. Cannon opined Wurth qualified for a "DRE lumbar category II with a 13% whole person impairment."

Wurth also filed pre-injury records from Dr. Wayne C. Cole who performed a pre-employment physical on January 28, 2008 for River View. Dr. Cole noted Wurth had normal range of motion and mobility of the spine, and approved him without restriction. Wurth also submitted the April 15, 2011 pre-injury record of Dr. Nguyen. He noted Wurth has a

history of chronic low back pain which is managed by Dr. Starkey.

River View filed the pre-injury records of Dr. Starkey, MD/DC, which reflect he treated Wurth on a monthly basis from October 2, 2008 through September 14, 2011. On each visit, Wurth complained of low back pain and was diagnosed with lumbar strain and/or muscle spasms. He further received monthly chiropractic treatment and prescriptions of Lortab and/or Ultram for his low back. On his last visit dated September 14, 2011, less than two weeks prior to the work injury, Wurth complained in relevant part of low back pain radiating into his right hip and thigh. He also stated his pain increases with bending, lifting, and sitting over thirty minutes. Dr. Starkey prescribed Ultram and Lortab and provided chiropractic treatment.

River View filed Dr. Sexton's February 12, 2013 report. He noted the September 26, 2011 work event and subsequent treatment and surgery. Wurth reported "he did alright following surgery" and was released to return to work under no formal restrictions. Dr. Sexton performed an examination and reviewed the medical records, including those of Dr. Starkey. He diagnosed protruded intervertebral disc L4-5, right, as a result of the September 26, 2011 incident. He found Wurth had attained maximum medical

improvement and needed no additional treatment for his work-related injury. He recommended Wurth be aware of his back, maintain good back strength through exercise, and utilize proper biomechanics when lifting, bending or twisting. Like Dr. Cannon, Dr. Sexton placed Wurth in the DRE lumbar category III, but assessed a 10% impairment rating pursuant to the AMA Guides "because of his functional recovery and lack of residual symptoms." Regarding apportionment of the 10% impairment rating to a prior, active condition, Dr. Sexton stated as follows:

Mr. Wurth has been under treatment by a chiropractor and utilizing Lortab 7.5 mg (a narcotic analgesic) since 2008 for back complaints. These facts indicate an active impairment prior to the injury of 9-26-11. I would apportion his impairment as follows:

60% (6% PPI) to the pre-existing active condition;

40% (4% PPI) to the injury of 9-26-11.

Dr. Sexton opined Wurth is able to work at his usual and customary occupation for the indefinite future, noting he has successfully returned to work as a mechanic in an underground coal mine.

In the opinion, award and order rendered May 20, 2013, the ALJ found Wurth sustained an injury as defined by the Act on September 26, 2011. The ALJ made the following

observations concerning the treatment of Dr. Cannon,  
Wurth's treating physician:

The ALJ will look first at the opinion of the treating surgeon, Dr. Cannon, who found a 13% impairment, all attributable to the work incident. It does not appear that Dr. Cannon was made aware of Plaintiff's extensive low back treatment history and it does not appear that Dr. Cannon saw the Plaintiff on more than two occasions - a few weeks prior to the surgery and on the date of the surgery itself. Claimant was seen in post-op by a physician's assistant.

The ALJ found as follows regarding an active, pre-existing active condition:

The ALJ does further find that Mr. Wurth had a preexisting condition which was partially dormant and partially active prior to the incident in question. The incident of September 26, 2011 aroused the preexisting condition into disabling reality. McNutt Construction Co. v. Scott, Ky. 40 SW3d 854 (2001).

Regarding the assessment of impairment, the ALJ stated as follows:

As to the Plaintiff's permanent impairment rating, the ALJ adopts the finding of Dr. Sexton, a 10% permanent impairment to the body as a whole, based on the AMA Guides, Fifth Edition. The ALJ is inclined to go at the low end of the scale at 10% as opposed to the high end of the rating scale at 13% due to the extremely good recovery which the Plaintiff has enjoyed. The Plaintiff returned to his old job

making the same or greater wages and he is performing all of his job requirements without limitation or restriction. Thus, the 10% rating is the most appropriate.

Finally, the ALJ carved out a portion of the impairment rating, stating as follows:

The final issue to be determined is whether or not it is appropriate to "carve out" any portion of the 10% impairment as an "active" component. The ALJ cannot discount the fact that claimant had seen Dr. Starkey and complained of low back pain approximately 33 times during the three years immediately prior to the work incident. Discussions between Dr. Starkey and the Plaintiff had included an MRI of the lumbar spine. This discussion occurred just 12 days prior to the injury. Thus, the preexisting low back condition was clearly symptomatic prior to the work incident. The other requirement for proving a preexisting "active" impairment is that the condition be impairment ratable prior to the incident in question. Finley v. DBM Technologies, 217 S.W. 3d 261 (Ky. App. 2007). In this case, the ALJ has an opinion from Dr. Sexton that 60% of the impairment was preexisting active. Thus, the ALJ does have an option, to choose between the opinions of Dr. Cannon and Dr. Sexton. In this particular case, the opinion of Dr. Sexton is more persuasive and is more consistent with the evidence adduced during these proceedings. Although Mr. Wurth attempted to downplay the effects of his preexisting condition, it cannot be denied that he was suffering from severe back pain immediately prior to the work incident and that he was receiving regular treatment and

prescriptions for pain medication. Dr. Cannon noted "no prior episodes" in his records and was apparently just unaware of Mr. Wurth's history of treatment by Dr. Starkey. Thus, it does not appear that Dr. Cannon considered all of the relevant information in the assessment of his impairment rating and that his rating is based upon an incomplete and an inaccurate history. Consequently, the ALJ does hereby find that 6% of Mr. Wurth's permanent impairment was a prior active condition and that 4% of his impairment is directly attributable to the work incident.

Accordingly, the ALJ awarded PPD benefits, TTD benefits and medical benefits. He also noted if Wurth's employment should cease under the conditions set forth in KRS 342.730(1)(c)2, and consistent with the limitations set forth in applicable case law, he would be entitled to reopen his claim for imposition of the two multiplier.

Wurth filed a petition for reconsideration alleging several errors. He alleged the ALJ failed to find Dr. Cannon felt immediate surgery was necessary, but was delayed due to River View's denial. He also argued Dr. Sexton failed to be specific regarding his functional recovery and/or lack of residual symptoms, and had no factual basis for apportioning any part of the impairment rating to a pre-existing active condition. Wurth argued the ALJ's statement Dr. Cannon was not aware of his low back treatment history was made without any supporting

evidence and must be considered supposition. Likewise, he argued the ALJ erred in concluding Dr. Cannon did not consider all of the relevant information in his assessment of impairment, and his opinion was based upon an incomplete and inaccurate history. Wurth argued the ALJ erred in ignoring his and his wife's testimony. Wurth's petition was summarily denied by order dated July 8, 2013.

On appeal, Wurth argues the ALJ erred in finding "It does not appear that Dr. Cannon was made aware of [his] extensive low back treatment history and it does not appear that Dr. Cannon saw [him] on more than two occasions . . ." Wurth asserts this is mere speculation. Wurth also disputes the ALJ's finding he enjoyed an extremely good recovery in adopting the 10% impairment rating, rather than the 13% impairment. He directs us to the hearing testimony asserting he has not experienced an "extremely good recovery" and is not "performing all his job requirements without limitation or restriction." Wurth also argues the ALJ erred in carving out 6% of his impairment as an active, pre-existing condition. Again, Wurth directs us to his testimony establishing he has never experienced back pain or numbness like he did on September 26, 2011, and had never had right leg pain prior to the accident. He further disputed the number of office visits he made with Dr.

Starkey. Likewise, it appears Wurth argues the ALJ erred in relying upon Dr. Sexton's report.

As the claimant in a workers' compensation case, Wurth bore the burden of proving each of the essential elements of his cause of action before the ALJ, including extent and duration of an alleged disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Wurth was unsuccessful on this issue, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence 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).

KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). 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 10 (Ky. 1979). The ALJ, as fact-finder,

may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Although a party may note evidence supporting a different outcome than 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).

With the above standard in mind, we find Wurth's arguments on appeal are essentially an attempt to have the Board re-weigh the evidence, engage in fact-finding, and substitute its opinion for that of the ALJ. It was the ALJ's prerogative to find "it does not appear that Dr. Cannon was made aware of Plaintiff's extensive low back treatment history and it does not appear that Dr. Cannon saw the Plaintiff on more than two occasions." As noted by the ALJ, Dr. Cannon personally saw Wurth on few occasions. Dr. Cannon further noted "no prior episodes" on October 12, 2011 and the July 28, 2012 letter was completely silent regarding Wurth's low back treatment history with Dr. Starkey.

We likewise find it was the ALJ's prerogative to find Wurth enjoyed an extremely good recovery. We acknowledge Wurth is able to point to testimony to the contrary. However, the ALJ's determination is supported by both the medical records and Wurth's return to his usual work without formal restrictions. The January 4, 2012 note of Mr. Umbach indicated Wurth is doing well following the surgery and continues to have no leg pain. Likewise, Dr. Nguyen noted Wurth's back pain significantly improved after surgery. Finally, in the July 28, 2012 letter, Dr. Cannon

stated Wurth "was doing well and had no neurological deficits postoperatively."

Although not directly argued by Wurth, we find substantial evidence exists in the record supporting the ALJ's reliance on Dr. Sexton's 10% impairment rating. Essentially, the ALJ was faced with the assessment of impairments from Drs. Cannon and Sexton. If "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The ALJ's decision to rely upon Dr. Sexton's impairment rating will not be disturbed. Wurth asserts Dr. Sexton's examination only lasted 11 minutes, and the interview lasted 32 minutes. Such a fact goes toward the weight of the evidence which the ALJ is free to consider, but is not compelled to accept, in rendering his or her decision.

Finally, the ALJ did not err in attributing 6% of Wurth's 10% impairment rating to a pre-existing active condition. This determination is supported by the opinion of Dr. Sexton, and the records of Dr. Starkey. In Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007), 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." Moreover, as an affirmative defense, the burden to prove the existence of a pre-existing active condition falls on the employer. Id. Since River View was successful in its burden, the question on appeal is whether the ALJ's determination is supported by substantial evidence. "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).

The ALJ utilized the correct standard set forth in Finley, supra, in determining Wurth had a pre-existing active condition. In finding Wurth's pre-existing condition was symptomatic, the ALJ relied on Dr. Starkey's medical records indicating Wurth had received medical and chiropractic treatment for low back complaints on a monthly basis since November 2008 and continuing until September 14, 2011, less than two weeks prior to the work accident. The ALJ also relied upon Dr. Sexton's opinion in finding the pre-existing condition was impairment ratable prior to the incident in question. As noted above, in his report, Dr. Sexton stated he reviewed medical records, including

those of Dr. Starkey. He assessed a 10% impairment rating for Wurth's low back condition. Dr. Sexton apportioned 6% to a pre-existing active condition stated as follows:

Mr. Wurth has been under treatment by a chiropractor and utilizing Lortab 7.5 mg (a narcotic analgesic) since 2008 for back complaints. These facts indicate an active impairment prior to the injury of 9-26-11.

The medical records of Dr. Starkey and the opinions of Dr. Starkey constitute substantial evidence supporting the ALJ's determination, and his decision will not be disturbed. Although Wurth is able to point to evidence in his favor, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., supra.

Accordingly, the May 20, 2013 opinion and the July 8, 2013 order overruling Wurth's petition for reconsideration rendered by Hon. Edward D. Hays, are hereby **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON STEPHEN M ARNETT  
P O BOX 419  
MORGANFIELD, KY 42437

**COUNSEL FOR RESPONDENT:**

HON TIMOTHY C FELD  
333 WEST VINE ST, STE 300  
LEXINGTON, KY 40507

**ADMINISTRATIVE LAW JUDGE:**

HON EDWARD D HAYS  
PREVENTION PARK  
657 CHAMBERLIN AVE  
FRANKFORT, KY 40601