Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 26, 2016

CLAIM NO. 201500149

MICHAEL BLAUROCK PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

COMAIR, INC.
DELTA GLOBAL SERVICES
HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE
AND HON. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING
* * * * * *

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

STIVERS, Member. Michael Blaurock ("Blaurock") seeks review of the September 11, 2015, Opinion and Order of Hon. William J. Rudloff, Administrative Law Judge ("ALJ") dismissing his claim for income and medical benefits against Comair, Inc. ("Comair") for an alleged neck injury

occurring on June 30, 2008. The ALJ awarded Blaurock income and medical benefits for a work-related November 2014 right knee injury occurring while in the employ of Delta Global Services ("Delta"). Blaurock also appeals from the October 21, 2015, Opinion and Order on Reconsideration overruling his petition for reconsideration.

After Blaurock filed the notice of appeal he filed a motion to deconsolidate the claims and to remand the right knee injury claim (Claim No. 201459017) to the ALJ for approval of an attorney's fee.[1] By order dated January 6, 2016, this Board sustained the motion and remanded Claim No. 201459017 to the ALJ for consideration of the motion for approval of an attorney's fee. Consequently, we will only discuss the evidence pertaining to the June 30, 2008, neck injury.

In support of his alleged neck injury, Blaurock relied upon the March 25, 2015, report of Dr. Frank Burke and the November 12, 2008, office note of Dr. Leon Ravvin.

Comair relied upon the July 15, 2015, report of Dr. Timothy Kriss and the November 5, 2013, office note of Dr. Mark Swisher.

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[1] Blaurock filed both claims on February 4, 2015. By order dated April 13, 2015, the claims were consolidated.

Blaurock's April 21, 2015, deposition was introduced and he testified at the August 26, 2015, hearing. During his deposition, Blaurock provided the following description of how the injury occurred:

> Q: And I know this is kind of a weird case with the injury being so far back, but try and tell me to the best of your recollection what happened on June 30th of 2008 when you were with Comair.
>
> A: Okay. I was – I came out of our operations and got on the tug and was pulling out and somebody had parked a bag cart where I couldn't see traffic going through the breezeway. And as I cleared the cart, one of the guys was on another tug and he was coming in at a high rate of speed. I hit my brakes and he didn't slow down. He hit me full run. It's like he panicked. I could see it in his eyes. He just hit me.
>
> Q: Just tell the Judge, and the record, what a tug is.
>
> A: A tug is a vehicle that we use to pull carts with bags in it to and from the bag room to the airplane.
>
> Q: So you were in a tug and the other guy who hit was [sic] you [sic] in a tug, did he T-bone you?
>
> A: No. I was sort of like at an angle and he hit right at a diagonal, the front of mine.
>
> Q: Okay. And did anything strike you, luggage?
>
> A: No. I hit my head. I have a roll bar cage around me and the steal [sic] bar on the side here, I hit the side of my

> head and it swelled up to the size of a softball. It was big.
>
> Q: Did you lose consciousness?
>
> A: Not that I recall.

Blaurock testified that immediately after the accident he was more concerned about the other person who sustained a broken leg than his condition. However, when a co-worker saw the side of his head, he was taken to St. Joseph Hospital. He testified he had swelling on the left side of his head. At some point that day Blaurock developed a headache and soreness in his neck and shoulder. A couple of days after the accident, Blaurock experienced paralysis and complete numbness in the left arm. He was initially treated by his family physician, Dr. Swisher who referred him to Dr. Ravvin. He underwent physical therapy upon Dr. Ravvin's recommendation. Dr. Ravvin also recommended surgery which Blaurock declined. Only Drs. Swisher and Ravvin have treated his neck condition. Dr. Swisher did not impose work restrictions. Blaurock was unable to provide the date he last underwent treatment for his neck condition.

Currently, Blaurock has restricted motion in his neck. Except for an occasional aspirin, Blaurock takes no medication for his neck condition. He is unable to turn

his neck to either side. He is also unable to look up. When forced to look behind him, Blaurock must turn his entire body as he cannot turn his head to look over his shoulder. Blaurock experiences pain and numbness in his shoulders and arms daily. He estimated he takes over-the-counter medication approximately twice a month for neck pain. He believes the range of motion in his neck is a little worse now than at the time of the injury.

Blaurock chose not to see a doctor for his neck problems because he learned to live with his problems. He estimated he was off work for a couple of months after the injury. He returned to work at the same wages and hours. He estimated he worked between fifty and sixty hours per week. Blaurock disagreed with the notations in Dr. Swisher's November 5, 2013, record to the effect he had a good recovery from his neck injury with only a slight decrease in range of motion when looking to the right. He acknowledged he has been able to perform the hard physical labor required of a ramp agent over the last seven years.

In the September 11, 2015, Opinion and Order relative to the neck injury, the ALJ provided the following findings of fact and conclusions of law:

> I make the determination that the medical evidence from Dr. Kriss, the examining neurosurgeon, is very

> persuasive, compelling and reliable. Dr. Kriss stated that Mr. Blaurock had pre-existing active naturally occurring osteoarthritis and degenerative disc disease in his neck and not any [sic] work injury on June 30, 2008. Dr. Kriss stated that the plaintiff would not sustain any permanent impairment to the body as a whole under the AMA Guides, Fifth Edition, as a result of said accident. Dr. Kriss stated that he was unable to discern any objective medical basis on which to assign permanent physical restrictions, that the plaintiff reached maximum medical improvement from the 2008 accident on January 17, 2009 and that the plaintiff could continue his previous work duties as performed before the accident.
>
> . . .
>
> For all of the above reasons, the credible and convincing weight of the evidence in this case is against the plaintiff on the issue of work-relatedness/causation regarding the alleged work event of June 30, 2008 and the issue of injury as defined by the Act. I, therefore, make the determination that the plaintiff is not entitled to recover for workers' compensation benefits allegedly arising out of the work event of June 30, 2008.

As previously noted, based on the opinions of Dr. Gary Bray the ALJ determined Blaurock sustained a right knee injury on November 16, 2014, and November 19, 2014, while in Delta's employ and awarded income and medical benefits.

With respect to Blaurock's entitlement to medical benefits, the ALJ found as follows:

> Based upon the plaintiff's sworn testimony, as covered above, and the persuasive, compelling and reliable medical evidence from Dr. Bray, the examining orthopedic surgeon, as covered above, I make the determination that the plaintiff is entitled to recover for his work-related medical bills and expenses for his knee injury, both past and future, including his knee surgery. **However, I also make the determination that the plaintiff is not entitled to recover from his 2008 employer for any medical bills and expenses for that event. (emphasis added).**

The ALJ dismissed Blaurock's claim against Comair arising out of the alleged June 30, 2008, neck injury.

Blaurock filed a petition for reconsideration contending Comair had not produced evidence he had an active condition at the time of the 2008 incident. It requested the ALJ reconsider the dismissal of the claim based on Dr. Kriss' finding of a pre-existing active condition as his decision is not supported by substantial evidence.

In the October 21, 2015, Order the ALJ overruled the petition for reconsideration providing the same summary of Dr. Kriss' report contained in his decision. The ALJ

also provided the following language which also appears in his September 11, 2015, decision:

> For all of the above reasons, the credible and convincing weight of the evidence in this case is against the plaintiff on the issue of work-relatedness/causation regarding the alleged work event of June 30, 2008 and the issue of injury as defined by the Act. I, therefore, make the determination that the plaintiff is not entitled to recover for workers' compensation benefits allegedly arising out of the work event of June 30, 2008.

On appeal, Blaurock asserts the ALJ relied upon Dr. Kriss' opinions in dismissing his claim on the theory his cervical condition is not work-related but rather is due to a pre-existing active naturally occurring degenerative condition of the spine. Blaurock asserts the ALJ erroneously relied upon the opinions of Dr. Kriss as his opinions do not establish pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) he had a pre-existing active condition. The employer has the burden of proving the existence of a pre-existing active condition. He asserts the standard for entitlement to a carve out in the award of income benefits for a pre-existing active condition is controlled by Finley, supra, which requires the pre-existing condition to be both symptomatic and impairment ratable pursuant to the 5th Edition of the

American Medical Association, Guides to the Evaluation of Permanent Impairment.

Blaurock contends the dismissal of his cervical claim is unsupported by substantial evidence as Comair produced no evidence of an active ratable pre-existing condition. Blaurock contends he repeatedly testified he had no pain or symptoms in the neck region before June 30, 2008. He asserts the evidence is to the contrary as Dr. Ravvin's November 12, 2008, note states he suffered from left cervical radiculopathy at C5-6 and C6-7. Further, Dr. Ravvin indicated that even though the cervical degenerative disk disease pre-dates the injury it is likely the excessive jerking that took place on the date of injury caused Blaurock's problems to be symptomatic. Blaurock points out Dr. Ravvin's record is the only medical note which was generated contemporaneous with the injury.

As the claimant in a workers' compensation proceeding, Blaurock had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Blaurock was unsuccessful in that 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 10 (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).

The eighteen page report of Dr. Kriss reveals he conducted an examination on July 15, 2015. Among the physicians' records reviewed were those of Drs. Swisher and Ravvin. He also reviewed various medical records from physical therapy, Lexington Clinic, Lexington Clinic Ambulatory Surgical Center, Central Kentucky Medical Group, Medworks, Woodford Memorial Hospital and St. Joseph Hospital, as well as Blaurock's April 21, 2015, deposition. Dr. Kriss set forth Blaurock's current complaints, Blaurock's description of the injury, the results of his examination, and his observation regarding the diagnostic studies. Dr. Kriss' diagnosis was "intermittent, purely positional left ulnar neuritis." He noted Blaurock only had numbness in the left forearm and fingers when he sleeps in a certain position. When the numbness awakens him, as

soon as Blaurock shakes his left arm and elbow the numbness disappears within seconds. Dr. Kriss noted this occurred because Blaurock inadvertently put physical pressure on the ulnar nerve at the most vulnerable superficial point.

Dr. Kriss opined Blaurock contused his scalp and strained his neck muscles on June 30, 2008 and subsequently incurred temporary left upper extremity cervical radiculitis with radicular pain, numbness, and weakness in the left upper extremity as confirmed by Drs. Ravvin and Swisher. The cervical radiculitis completely resolved in six months, largely because both the neck strain and the radiculitis were considerably exacerbated by a subsequent January 18, 2009, motor vehicle accident. Dr. Kriss noted in August 2010, Blaurock re-exacerbated the neck pain and left shoulder pain after working twenty hours per day for a week. This was the only time Blaurock sought medical attention for any reason in 2010. Dr. Kriss provided the following summary concerning Blaurock's treatment after the work injury:

> 1) With the steady, impressive, and continuing improvement in all cervical complaints documented by Dr. Swisher and Ravvin in the last half of 2008.
>
> 2) With no treatment whatsoever between February, 2009 and August, 2010 (after the January 2009 truck accident exacerbation).

> 3) With no treatment whatsoever between August, 2010 and November, 2014 (after recovering from the "overworking baggage loading" exacerbation in August, 2010).
>
> 4) With no treatment whatsoever after November, 2014 (while recovering from the right knee meniscal tear).
>
> 5) With not the slightest mention of any cervical or upper extremity complaints whatsoever at 20 (TWENTY) separate primary care, orthopedic, and physical therapy evaluations between November, 2014 and March 2015.
>
> 6) With Dr. Swisher explicitly declaring "good recovery from the (2008) neck injury."
>
> 7) With Dr. Dome TWICE documenting that Mr. Blaurock explicitly "denies paresthesias or radicular symptoms" in January, 2015, and
>
> 8) With Dr. Dome TWICE documenting that Mr. Blaurock explicitly "denies any other current musculoskeletal complaints" in January, 2015.

While Blaurock may have experienced temporary cervical and radicular complaints in the latter half of 2008, which may have been temporarily exacerbated in January 2009 due to the motor vehicle accident and when he was overworked in 2010, Dr. Kriss believed those cervical symptoms did not permanently persist and did not require ongoing long term treatment. Dr. Kriss noted those symptoms required no specific medical evaluation or treatment for almost five years. Consequently, Dr. Kriss

concurred with Dr. Swisher that Blaurock enjoyed good recovery from the 2008 neck injury, and with Blaurock when he stated twice in January 2015 he has no paresthesias, no radicular symptoms, and no other current musculoskeletal complaints.

Dr. Kriss opined the medical evidence compels a conclusion there was no permanent harmful change to the cervical spine on June 30, 2008, which is consistent with the absence of any cervical symptoms, treatment, testing, evaluation, and restrictions in the five years between 2010 and 2015. To further reinforce his conclusion, Dr. Kriss stated one need only compare the litany of current symptoms Blaurock retrospectively attributes to the June 30, 2008, incident with his medical records from 2010 through 2015. Dr. Kriss noted an examination of Blaurock's medical records covering the period from 2011 to 2015 reveal he expressed none of his current complaints. Since there were no significant clinical findings, no neurological impairment, and no documented significant alteration in structural integrity, Dr. Kriss opined an impairment rating should not be assigned. Dr. Kriss noted Blaurock's "cervical story" is as follows:

> NEVER complains of **anything** cervical at more than 20 medical evaluations in 2014 and 2015

> NEVER complains of **anything** cervical at close to five years' worth of medical evaluations between 2011 and 2015, and who
>
> NEVER seeks **any** cervical spine medication, treatment, diagnostic testing, or restrictions during the five years 2011, 2012, 2013, 2014, and 2015.
>
> When we closely compare Example Patient 15-12 on page 393 of the Fifth Edition AMA Guidelines (with DRE category one, 0% cervical impairment) to Mr. Blaurock, it becomes clinically obvious that Mr. Blaurock must also be placed in DRE category one, and must also receive 0% cervical impairment.

Dr. Kriss construed the June 20, 2008, rollbar incident, the January 18, 2009, MVA, and the August 2010 episode where Blaurock was overworked as temporary cervical musculoskeletal strains with no lasting or permanent impairment. The June 30, 2008, accident caused a temporary cervical radiculitis, but there was no evidence of permanent harmful change to the cervical spine from any traumatic cause. Dr. Kriss stated as follows:

> The three transient cervical events were all superimposed upon Mr. Blaurock's radiographically-proven diffuse, fairly advanced cervical spine osteoarthritis, which is a naturally occurring condition, exceedingly common in all patients in Mr. Blaurock's age group (late 50s), and responsible for Mr. Blaurock's persistent 'slight decrease' in cervical range of motion. Such mild decrease in joint mobility

> (with mild intermittent pain) is **precisely** how osteoarthritis typically presents in humans as they age.

Dr. Kriss concluded Blaurock had no permanent work-related physical restrictions and he could perform his previous work duties. Any restrictions would be on the basis of Blaurock's pre-existing active naturally occurring osteoarthritis and degenerative disc disease and not due to a work injury. Further, since Blaurock's cervical radiculitis and cervical musculoskeletal strain of June 30, 2008, fully resolved there was no need for additional treatment. Based on the records Dr. Swisher generated in 2008 after the injury and the fact Blaurock was involved in an MVA on January 18, 2009, Dr. Kriss concluded Blaurock attained maximum medical improvement on January 17, 2009.

The November 11, 2013, medical record of Dr. Swisher reveals on that date he noted Blaurock had a good recovery from the neck injury. He also noted there was only a slight decrease in the range of motion of his neck when Blaurock looked to the right.

Contrary to Blaurock's assertion, the opinions of Dr. Kriss and the November 11, 2013, medical record of Dr. Swisher constitute substantial evidence on which the ALJ was free to rely in reaching a decision on the merits. Kentucky Utilities Co. v. Hammons, 145 S.W.2d 67, 71 (Ky.

App. 1940) (citing American Rolling Mill Co. v. Pack et al., 128 S.W. 2d 187, 190 (Ky. App. 1939). Thus, the evidence does not compel a contrary result.

We disagree Finley v. DBM Technologies, supra, applies, as it sets out what must be established by the employer in order for there to be a carve out or apportionment in the award for a pre-existing active condition. The need for a carve out or apportionment necessarily presupposes the occurrence of a work-related injury meriting an impairment rating and an award of income benefits. When a permanent injury is not present the need to establish a pre-existing active condition supporting a carve out or apportionment in the award is unnecessary. Relying upon the opinions of Dr. Kriss, the ALJ determined the event of June 30, 2008, did not result in a permanent injury. Thus, Finley v. DBM Technologies, supra, is not applicable.

Dr. Kriss concluded Blaurock did not sustain an injury meriting an impairment rating and by extension an award of income and medical benefits. His opinion constitutes substantial evidence in support of the ALJ's decision not to award permanent income and medical benefits. Because the outcome selected by the ALJ is supported by substantial evidence and a contrary result is

not compelled, we are without authority to disturb his decision to dismiss Blaurock's claim for permanent income and medical benefits. Special Fund v. Francis, supra.

That said, although not raised by Blaurock, for multiple reasons we vacate that portion of the ALJ's decision dismissing Blaurock's neck injury claim. In the August 14, 2015, Benefit Review Conference Order & Memorandum the parties stipulated Blaurock sustained a work-related injury on June 30, 2008. The parties also stipulated temporary total disability benefits were paid spanning the period from September 3, 2008, through December 7, 2008, and medical benefits were paid in the amount of $13,083.79. Just as important, Dr. Kriss, upon whom the ALJ relied, expressed the opinion numerous times in his report that Blaurock sustained a temporary work injury. Thus, the ALJ erred in dismissing with prejudice Blaurock's claim. Blaurock is clearly entitled to an award of temporary income and medical benefits. Blaurock's unrebutted testimony and the stipulations establish he missed work and incurred medical expenses due to the work injury. Comair did not dispute this fact.

Based on the evidence Blaurock is entitled to such an award. Accordingly, the claim will be remanded for

an appropriate award of temporary income and medical benefits in accordance with the evidence in the record.

Accordingly, the September 11, 2015, Opinion and Order and the October 21, 2015, Opinion and Order on Reconsideration finding Blaurock did not sustain a permanent work injury and is not entitled to permanent income and medical benefits are **AFFIRMED**. Those portions of the September 11, 2015, Opinion and Order and the October 21, 2015, Opinion and Order on Reconsideration relating to the dismissal of the 2008 neck injury claim with prejudice are **VACATED**. This claim is **REMANDED** for the appropriate award of temporary income and medical benefits.

ALL CONCUR.

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