Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 12, 2014

CLAIM NO. 201200460

PASCAL NDIKUMANA PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

PERDUE FARMS, INC.
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

* * * * * *

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

ALVEY, Chairman. Pascal Ndikumana ("Ndikumana") appeals from the Opinion, Award, and Order rendered September 9, 2014 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), awarding permanent partial disability ("PPD") benefits and medical benefits for a cervical injury sustained on October 1, 2010 while employed by Perdue Farms,

Inc. ("Perdue Farms"). No petition for reconsideration was filed by either party.

On appeal, Ndikumana argues the evidence compels a finding of a work-related right arm injury warranting an award of benefits. Ndikumana also argues the ALJ erred in finding he retains the physical capacity to return to the same type of work he performed at the time of his injury. We disagree and affirm in part. However, the claim is vacated and remanded to the ALJ to clarify the award of medical benefits.

Ndikumana filed a Form 101 on April 11, 2012 alleging he injured his neck, back, right arm and right elbow on October 1, 2010 when several boxes fell on him. The Form 104 work history indicates Ndikumana resided in Africa before moving to the United States in January 2010. He worked at Perdue Farms, a poultry processing plant, from May 17, 2010 to December 1, 2010. In support of his claim, Ndikumana attached the October 26, 2010 physical therapy initial evaluation from Bluegrass Outpatient Center. Ndikumana complained of neck, low back and right elbow pain due to the October 1, 2010 work accident. After an examination, the physical therapist assessed "severe cervical and lumbar strain due to his injury and work" and recommended a course of therapy.

Ndikumana testified by deposition on May 6, 2014 and at the hearing held July 23, 2014. Ndikumana is thirty-six years old and resides in Bowling Green, Kentucky. He is right hand dominant. Ndikumana is from Burundi, Africa, where he completed high school and two years of college. Ndikumana testified he did not work while living in Africa. He came to the United States in January 2010 as a refugee. Ndikumana does not speak English and required the services of an interpreter throughout the litigation of this claim.

Ndikumana began working for Perdue Farms on May 17, 2010. Ndikumana testified he removed parts of meat with scissors as they passed by him on a conveyor belt. When asked if he had to do any heavy lifting at the deposition, Ndikumana responded "No. So when I was just cutting through the meat, I would just pick it up and pull and put from a conveyor and keep going." He was initially paid $9.51 per hour, which was increased to $10.21 per hour after three months of employment. He worked forty hours a week on the third shift.

Ndikumana testified three boxes of meat fell on top of him on October 1, 2010, striking his head, shoulder, and back. The impact caused him to fall to the ground. His supervisor urged him to return to the line to complete his shift. Ndikumana testified he complied and returned to the

line, but he was unable to work due to the effects of the injury. Ndikumana continued to work for approximately a week, only using his left arm, before seeking medical treatment at Greenwood Urgent Care. He continued to work because he was told he would be fired if he missed any days. Greenwood Urgent Care prescribed medication, and also recommended x-rays which were denied by Perdue Farms. Subsequently, Ndikumana missed four days of work, but returned after Perdue Farms threatened to fire him. Thereafter, he continued to work at Perdue Farms, only using his left arm, until he was fired on December 1, 2010. During his employment with Perdue Farms, he received treatment at Greenwood Urgent Care on several occasions, underwent x-rays and engaged in physical therapy. Ndikumana stated he has not received any treatment since he was fired due to his financial situation and lack of health insurance.

Ndikumana remained unemployed until November 11, 2012, when he began working part-time at Macy's as a packer. At his deposition, Ndikumana stated he packed small merchandise to be shipped to customers, and none of the items weighed more than ten pounds. At the hearing, Ndikumana stated the heaviest items he had to lift were shirts, shoes, dresses and purses. He continued to work at Macy's for over a year until December 2, 2013, earning

$10.35 per hour. Ndikumana did not receive treatment for his alleged October 1, 2010 work injuries while he worked at Macy's. He has not worked since leaving Macy's. Ndikumana indicated his job at Macy's was not as physical as his job at Perdue Farms.

Ndikumana was involved in a motor vehicle accident ("MVA") on March 22, 2013 while working for Macy's. On the day he left his employment with Macy's, Ndikumana was involved in a second MVA. He was taken to the hospital by ambulance, and treated at the Urgent Care Center on several occasions. He insisted he did not sustain any major injuries due to the MVAs.

Ndikumana testified he is alleging injuries to his neck, back and right arm due to the October 1, 2010 accident. He stated he had no problems with, and did not seek any treatment for, his neck, arm or back prior to the work accident. Ndikumana testified he is unable to drive because "my right hand doesn't work, so I can't drive with one hand." Ndikumana indicated his right hand is paralyzed and he is unable to raise his right arm at or above his head, or move it laterally. When asked whether he is able to use his right arm as long as it is close and low to his body, Ndikumana testified "No, impossible. There is no

strength in it." He also indicated he is unable to bend his back.

Ndikumana testified he is unable to return to his former job at Perdue Farms because he can only use his left hand. He testified he is unable to turn his neck side to side and up and down, or bend his back. His former job required him to lift over his shoulder. At the hearing, he testified it would be impossible for him to return to Perdue Farms, stating he is "totally paralyzed." He also indicated he does not have the strength or speed required to work his former job at Perdue Farms.

Amadou Bah ("Bah"), a friend of Ndikumana and his family, also testified at the hearing. Bah testified before October 1, 2010, he had observed Ndikumana use his right arm with no problem and stated he had no physical problems. After October 1, 2010, Bah stated Ndikumana could not use his right hand to lift things like he used to or pick up his children with his right arm.

Mike Jones ("Jones"), a line supervisor with Perdue Farms since 2007, also testified at the hearing. Jones testified he supervised Ndikumana, who was a debone laborer. On the day of the accident, Ndikumana was stacking plastic crates filled with product onto a dolly. Jones stated eight crates would be stacked, and would be

approximately head level once completed. Each crate weighed approximately thirty to thirty-five pounds.

Although Jones did not see the accident, he observed Ndikumana afterwards. Jones testified Ndikumana returned to the trimming line, and did not seem to have any difficulty. Jones admitted at some point, Ndikumana reported he was having neck problems and was taken to the Wellness Center located at the plant. Jones stated Ndikumana was fired from Perdue Farms because he stopped coming to work for three days. Jones stated Ndikumana never brought him a doctor's excuse and he did not know whether he brought a doctor's excuse to the Wellness Center.

Perdue Farms filed the employment records from Macy's as an exhibit during the final hearing. Those records indicate Ndikumana began working for Macy's on November 9, 2012 as a warehouse associate in the packing department on a part-time, seasonal basis. He became a regular part-time associate in May 2013. He earned $10.35 per hour. The job description indicates a warehouse associate is required to lift sixty pounds regularly, move more than seventy-five pounds with a two person lift as needed, and to stand for long periods of time. The employment records also contain the hours worked and wages

earned by Ndikumana from November 9, 2012 through December 1, 2013.

Perdue Farms also filed correspondence regarding the March 22, 2013 MVA indicating Ndikumana treated at the emergency room and at Urgentcare. Ndikumana was diagnosed with neck, thoracic and lumbar sprain, prescribed medication and referred to physical therapy where he received treatment from April to May 2013. He was off work for two weeks due to the accident. The claim for the MVA was ultimately resolved by settlement.

Perdue Farms filed surveillance video from May 30, 2014, May 31, 2014 and June 2, 2014, showing Ndikumana engaging in several activities including manipulating tomato plants, and picking up his children.

Ndikumana filed the April 23, 2012 report of Dr. James Farrage who noted Ndikumana underwent conservative treatment following the October 1, 2010 work accident, including non-steroidal medication and physical therapy. X-rays were taken on October 21, 2010. The cervical spine films revealed multilevel degenerative disc disease with associated grade I retrolisthesis at C5-6. The lumbar spine films demonstrated multilevel degenerative disc disease throughout the thoracic spine and degenerative disc disease at L2-3 and L3-4. Dr. Farrage diagnosed status post work-

related injury on October 1, 2010 with resultant cervical degenerative disc disease with secondary myofascial pain syndrome, lumbar degenerative disc disease, and right lateral epicondylitis. Dr. Farrage opined Ndikumana has reached medical maximum improvement, and should follow up with his primary treating physician as directed. Pursuant to the Fifth Edition of the American Medical Association, Guides the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Farrage assessed a 7% impairment rating for the cervical spine, 5% for the lumbar spine, and 3% for the right upper extremity, yielding a combined 15% impairment rating. Dr. Farrage attributed 3% of the combined total impairment to a pre-existing condition, premorbid multilevel degenerative disc involvement, resulting in a 12% impairment rating due to the October 1, 2010 work accident.

Dr. Farrage stated Ndikumana's employment with Perdue Farms falls within the "light to medium" category. Dr. Farrage restricted Ndikumana to lifting no more than thirty pounds occasionally, fifteen pounds frequently, and push or pull up to fifty pounds. Ndikumana can occasionally bend, squat and twist, and should be allowed to frequently change positions. He advised Ndikumana should avoid extended standing or sitting, repetitive right upper extremity use, and above shoulder level activity. Based

upon the job description, Dr. Farrage stated Ndikumana would be unable to fulfill its requirements.

Perdue Farms filed the July 2, 2014 report of Dr. Dennis O'Keefe who reviewed pre- and post-injury medical records, including those generated due to the October 1, 2010 work accident and the two subsequent MVAs on March 30, 2013 and December 2, 2013. Dr. O'Keefe performed an examination. He concluded Ndikumana "currently demonstrates marked histrionic and theatrical behavior on his current physical examination. This makes detailed evaluation of range-of-motion at the neck and low back impossible." The examination of the right upper extremity revealed marked wasting of the right deltoid muscle when compared to the left, indications of longstanding denervation and renervation in the right shoulder region, and complaints of excruciating pain.

Regarding the cervical spine, Dr. O'Keefe opined Ndikumana had pre-existing degenerative disc disease at the C5-6 level which "may have been made mildly worse by the work-related injury of October 1, 2010." Dr. O'Keefe assessed a 5% impairment rating for the cervical spine condition pursuant to the AMA Guides. Regarding the lumbar spine, Dr. O'Keefe opined the changes involving the L2-3 disc space pre-existed the October 1, 2010 work injury. He

stated Ndikumana sustained a mild lumbar strain/sprain due to the work accident warranting a 0% impairment rating pursuant to AMA Guides. Regarding the right upper extremity, Dr. O'Keefe stated as follows:

> With regard to Mr. Ndikumana's right upper extremity weakness, I cannot explain why my findings are so different than the other previous examiners who described only the mildest abnormalities. In my opinion, the patient's right upper extremity weakness most likely represents a traumatic upper brachial plexus injury due to birth or trauma at some point in time in the past. I find no indication that this would be related to the work-related injury of October 1, 2010.

Dr. O'Keefe found Ndikumana's headaches unrelated to the October 1, 2010 work event. He stated Ndikumana does not have any physical limitations due to his work-related neck or back injuries. He further stated, "[h]e does have marked weakness of the right upper extremity but this appears to be associated with some other unrelated trauma that the patient suffered, which limits the use of his right upper extremity."

In the September 9, 2014 opinion, the ALJ found Ndikumana sustained a 5% impairment rating related to the cervical injury only due to the October 1, 2010 work injury, and retains the physical capacity to perform the job duties

he performed at the time he was injured. In support of this determination, the ALJ stated as follows:

> Pascal's claim is wrought with problems from the outset, none of which are made any simpler by the language barrier and even further complicated by his own frustration. Even with an interpreter, it is not clear that he communicated what he intended. For example, he referred to his arm as paralyzed when anyone could see he does not suffer from actual paralysis. He did not come across as having an intent to fabricate the entire injury although the two MVA's and the regular work at Macy's certainly muddy the water for him as does the surveillance video showing him using his right arm at least quite a bit more than he testified he is able to use it. The point is, this is a case where the medical evidence is relied upon with much less significance on the claimant's own testimony since relying on claimant's testimony would very possibly lead to dismissal of the claim.
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> Dr. O'Keefe is relied upon rather than Dr. Farrage since Dr. Farrage's failure to place significance on factors other than the work injury lead to what is found to be an inaccurate rating. Dr. O'Keefe's opinion that the headaches and the lumbar condition were all preexisting is most believable.
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> Pascal's testimony that he did not have to use his right arm to work at Macy's is not believable. Nor is it believable that he could not return to his same work due to the work injury since he did return to the same job until he was fired for missing three days in a row. Dr. O'Keefe gave no restrictions due to the work injury.

The ALJ determined Ndikumana is not entitled to temporary total disability benefits because he failed to prove there was a period he could not return to work. The ALJ also stated she did not rely on Ndikumana's testimony since it is exaggerated and too contradictory to the facts and undisputed evidence. The ALJ then determined Ndikumana "is entitled to medical benefits for the cure and/or relief of the effect of the cervical injury as have already been paid." In support of this determination, the ALJ noted Dr. O'Keefe opined Ndikumana's pre-existing cervical condition was only mildly affected by the work injury, there is no recommended ongoing treatment for the cervical condition, and there is no medical evidence demonstrating a need for treatment related to the work injury at this time. The ALJ awarded PPD benefits and medical expenses "as may reasonably be required for the cure and/or relief from the effects of the worker's compensation injury."

No petition for reconsideration was filed. On appeal, Ndikumana argues the ALJ "erroneously ignored all evidence regarding Petitioner's right arm injury." He points to his own testimony, Bah's testimony, the surveillance videos depicting him having difficulty with his right arm and the report of Dr. Farrage. Ndikumana states

Dr. O'Keefe has almost exclusively acted as a defense independent medical evaluator in worker's compensation cases, and that his opinions are not based on medical expertise. Ndikumana states Dr. O'Keefe did not identify the prior trauma which caused his current right arm condition. His conclusion Ndikumana's right arm condition is due to birth or a prior trauma conflicts with Dr. O'Keefe's own testimony, and the lack of medical evidence indicating a prior trauma. Ndikumana insists the evidence shows "conclusively" he has a right arm injury, and there is no evidence of any pre-existing right arm injury outside of Dr. O'Keefe's report.

Ndikumana argues the ALJ erred in finding he retains the physical capacity to return to his prior position with Perdue Farms relying upon the restrictions assigned by Dr. Farrage. He states he was able to do his job without difficulty prior to October 1, 2010, and he was no longer able to perform his job duties subsequent to the accident. He again argues the ALJ erred in relying upon the opinion of Dr. O'Keefe since his conclusions regarding his right arm injury is merely speculative, and not supported by any proof, objective or subjective. Ndikumana filed a reply brief essentially raising the same arguments.

As the claimant in a workers' compensation proceeding, Ndikumana had the burden of proving each of the essential elements of his cause of action, including causation/work-relatedness of his right arm condition and the application of the three multipliers pursuant to KRS 342.730(1)(c)1 Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Ndikumana 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 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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

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, supra.

Additionally, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial

evidence contained in the record to support the ALJ's conclusion. Stated differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Throughout his brief to the Board, Ndikumana insists the evidence establishes he sustained a right arm injury. This may be so, but in order to be entitled to benefits, he must also prove his injury is due to the October 1, 2010 accident. In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). The ALJ sufficiently articulated her reasoning in concluding Ndikumana sustained only a cervical injury warranting an impairment rating due to the October 1, 2010 work injury. The ALJ clearly placed little significance on Ndikumana's testimony, and articulated her reasoning for not doing so. The ALJ, as fact-finder, was free to reject his testimony. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

The parties submitted scant treatment records. The ALJ was faced with two conflicting medical reports, and relied upon the opinion of Dr. O'Keefe that Ndikumana's right arm weakness "most likely represents a traumatic upper

brachial plexus injury due to birth or trauma at some point in time in the past. I find no indication that this would be related to the work-related injury of October 1, 2010." Dr. O'Keefe's opinion regarding the causation of the right upper extremity condition constitutes the requisite substantial evidence to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). While Ndikumana has identified proof which may support a finding of work-relatedness, mainly the opinion of Dr. Farrage, such result is not compelled. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

We reject Ndikumana's assertion the ALJ "ignored" all evidence regarding his right arm injury. The ALJ summarized all evidence in the record, including Ndikumana's testimony, Bah's testimony, the surveillance video, and the opinion of Dr. Farrage. She explained why she placed little significance on Ndikumana's testimony. She also indicated the surveillance video was inconsistent with Ndikumana's testimony by stating it showed "him using his right arm at least quite a bit more than he testified he is able to use it." She found the opinion of Dr. O'Keefe more persuasive than that of Dr. Farrage. The ALJ acted within her discretion as fact-finder, and because substantial evidence

exists in the record supporting her decision, no contrary result is compelled.

For the same reasons, we find no error in the ALJ's determination Ndikumana retains the physical capacity to return to his former job with Perdue Farms. The ALJ relied upon Dr. O'Keefe's opinion and the fact Ndikumana continued to work after the October 1, 2010 accident until he was fired in December 2010. Dr. O'Keefe stated Ndikumana "does not have any physical limitations related to neck or back injuries which occurred on October 1, 2010." He further stated Ndikumana's right upper arm weakness "appears to be associated with some other unrelated trauma that the patient suffered, which limits the use of his right upper extremity." There is no evidence in the record any treating physician placed Ndikumana on light duty or assigned work restrictions due to the October 1, 2010 accident. Again, Dr. O'Keefe's opinions alone constitute substantial evidence supporting the ALJ's determination regarding his capacity to return to work and no contrary result is compelled.

With that said, the award of medical benefits is vacated and the claim is remanded to clarify the award of medical expenses. In the findings of fact and conclusions of law section, the ALJ determined "Plaintiff is entitled to medical benefits for the cure and/or relief of the effects

of the cervical injury as have already been paid." This limited entitlement of medical benefits seems to conflict with the language found the Award section. In the Award section, the ALJ stated "Plaintiff is entitled to recover from Defendant/Employer . . . such medical expenses as may be reasonably required for the cure and/or relief from the effects of the workers' compensation injury." On remand, the ALJ is directed to rectify this inconsistency.

Therefore, the September 9, 2014 Opinion, Award and Order by Hon. Jane Rice Williams, Administrative Law Judge, is hereby **AFFIRMED IN PART** regarding her determinations of causation and the application of the three multiplier. The award of medical benefits is **VACATED** and the claim is **REMANDED** to clarify the award of medical benefits.

ALL CONCUR.

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