

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 20, 2013

CLAIM NO. 201201076

ROGER AEBERSOLD

PETITIONER

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

RYAN TRANSPORTATION,
TY E. RICHARDSON, M.D.,
and HON JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Roger Aebersold ("Aebersold") appeals from the June 14, 2013 Opinion and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") and from the July 22, 2013 order denying Aebersold's petition for reconsideration. The ALJ dismissed Aebersold's claim against Ryan Transportation ("Ryan") in its entirety based

upon the opinion of Dr. Robert A. Jacob. Aebersold argues the ALJ failed to make sufficient findings of fact on the contested issues and erred in finding the shoulder injury was a pre-existing active condition. We affirm.

Aebersold alleged he sustained an electrical shock on February 28, 2012, while working on an electrical plug. He contends the shock caused injury to his right shoulder and loss of taste and smell. Aebersold did not seek medical treatment until several weeks after the alleged incident.

Also relevant to this claim is that Aebersold was involved in a road rage incident prior to the alleged work injury. After exchanging hand gestures with a fellow motorist, Aebersold blocked the other vehicle and punched the window of the other car twice. The second punch shattered the driver's side window of the other vehicle. Aebersold stated he used his left hand to strike the window even though he is right hand dominant. He denied any prior treatment or injury to his shoulder and testified he was not having problems with his right shoulder prior to the electrical shock injury.

Aebersold introduced medical records from Dr. Donald McAllister who treated Aebersold on April 3, 2012, for complaints of right shoulder pain, incomplete motion

and pain in overhead positioning. Dr. McAllister recorded "This started when he injured it. He felt something shock and this went through his shoulder and this started then. No previous problems before that." X-rays revealed minimal arthritis at the AC joint and a subacromial spur. Dr. McAllister diagnosed a rotator cuff tear.

Aebersold also submitted records from Dr. Ty Richardson who initially evaluated him on April 6, 2012, on referral from Dr. McAllister. Dr. Richardson diagnosed a right rotator cuff tear and a bicep tendon tear. Dr. Richardson performed a right shoulder arthroscopy on May 1, 2012, with good results.

Additionally, Aebersold introduced the report of Dr. Mark Barrett who performed an independent medical evaluation ("IME") on October 12, 2012. Dr. Barrett diagnosed shoulder pain and decreased range of motion, status post-surgery for rotator cuff injury of the right shoulder secondary to work injury, and neurobehavioral changes status post work injury. Dr. Barrett assigned a 3% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Barrett attached an article noting a high percentage of electrical

injury patients have the same type of symptoms Aebersold experienced.

Ryan introduced the report of Dr. Jacob who performed an IME on March 6, 2013. Dr. Jacob found full range of motion of the shoulder and indicated there would be 0% impairment on that basis. He assigned a 6% impairment pursuant to the AMA Guides for the distal clavicle resection. He opined 100% of this impairment is secondary to pre-existing active disease independent of any alleged electric shock injury. He found numerous inconsistencies in Aebersold's history, which he lacked credibility. Dr. Jacob found it highly unlikely Aebersold would use his left hand to shatter the window because he is right hand dominant. Dr. Jacob addressed causation as follows:

Lastly, I do not believe that it is within a degree of reasonable medical probability that even if he had sustained an electric shock that this shock would result in a rotator cuff tear. The operative note and the MRI abundantly document that he had longstanding degenerative changes in his acromioclavicular joint and a severe impingement with a subacromial spur. It is these arthritic changes that have been found to be associated with impingement syndrome and rotator cuff attrition. It is for the degenerative changes in the AC joint and the subacromial spur that he

underwent the distal clavicular resection.

Dr. Jacob concluded an electric shock is unlikely to be the mechanism of injury, and would not be the proximate cause of the rotator cuff tear.

After reviewing the evidence and identifying portions of Dr. Jacob's report, the ALJ indicated he found Dr. Jacob's medical opinion credible. The ALJ then determined Ryan had met its burden of proving a pre-existing condition and dismissed the claim in its entirety.

Aebersold filed a petition for reconsideration raising essentially the same arguments he now makes on appeal. By order dated July 22, 2013, the ALJ denied his petition for reconsideration without making any additional findings.

On appeal, Aebersold argues the ALJ failed to make sufficient findings of fact regarding the issues of work-relatedness, causation, notice, occurrence of injury, temporary total disability ("TTD") benefits and medical benefits. Aebersold contends the ALJ summarily dismissed the claim based upon a finding of a pre-existing active condition, which would not necessarily negate the issues of TTD and medical benefits. Aebersold requests remand of the claim for appropriate findings of fact regarding the

occurrence of a work injury, whether there was a period of TTD associated with the injury, and whether he is entitled to medical benefits.

Aebersold further argues the finding of a pre-existing and non-compensable shoulder condition is contrary to the evidence and case law and should be reversed. Aebersold asserts there is no evidence his shoulder condition was either symptomatic or impairment ratable prior to the work injury. Aebersold notes Dr. Jacob assigned a 6% impairment rating based upon the distal clavicle resection which occurred after the work injury and thus cannot be the basis for pre-existing impairment. Finally, Aebersold argues the issue of pre-existing active disability was not preserved as a contested issue at the benefit review conference.

It is well-established a claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Because Aebersold was unsuccessful in his burden of proof, the question on appeal is whether, upon consideration of the whole record, the evidence compels a finding in his favor. 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). As fact-finder, 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 supporting a different outcome than that reached by the ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 Dept. 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).

Here, the ALJ was faced with conflicting medical opinions regarding the cause of Aebersold's shoulder condition. Dr. Barrett related the rotator cuff injury to the alleged electrical shock. Dr. Jacob stated, within reasonable medical probability, the electric shock, if it occurred, would not be the cause of the rotator cuff tear. The ALJ, as was his prerogative, found the opinion of Dr. Jacob more persuasive. Before accepting the opinion of Dr. Jacob, the ALJ repeated Dr. Jacob's observations that the impairment assessed for the distal clavicle resection was attributable to the pre-existing active disease independent of any alleged electric shock, that Aebersold lacked credibility, and that even if the shock occurred, it would not have produced the rotator cuff tear. Although Dr. Jacob attributed causation to the pre-existing disease, he clearly also ruled out the alleged work injury as a cause

of the shoulder condition and the need for the surgery for which the impairment rating was assessed. Dr. Jacob's opinion is substantial evidence supporting the ALJ's dismissal; therefore, we may not reverse.

Because the ALJ determined the alleged work incident did not cause the rotator cuff injury, the additional findings requested by Aebersold are unnecessary. Aebersold continued to work following the alleged injury, and there is no indication he was temporarily totally disabled prior to his shoulder surgery. Again, Dr. Jacob opined the need for the surgery was not related to the alleged work injury and Aebersold did not need any further medical treatment. Nothing in the record indicates Aebersold received medical treatment for any condition other than his rotator cuff tear.

While we agree pre-existing active impairment was not preserved as a contested issue, work-relatedness/causation and injury as defined by the Act were preserved as contested issues in the benefit review conference order. Further Ryan filed a medical dispute challenging treatment by Dr. Richardson as not related to Aebersold's employment or a work-related injury. Aebersold did not object to introduction of Dr. Jacob's report. Moreover, the ALJ's dismissal was not solely based upon the

finding of a pre-existing condition. Rather, the ALJ accepted Dr. Jacob's opinion which included the exclusion of the alleged shock injury as a cause of the shoulder condition.

Accordingly, the June 14, 2013 Opinion and Order rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge and the July 22, 2013 order denying Aebersold's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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