

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 18, 2015

CLAIM NO. 201499215

ROGER BRENT BOLING

PETITIONER

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

OWENSBORO MUNICIPAL UTILITIES
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**
* * * * *

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

RECHTER, Member. Roger Brent Boling ("Boling") appeals from the May 22, 2015 Opinion and Award and the July 9, 2015 order denying his petition for reconsideration rendered by Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"). The ALJ determined Boling sustained a temporary exacerbation of a prior 2007 work injury as a result of a December 26, 2013 work incident. Boling argues

he suffered a distinct injury in December, 2013 and is entitled to a permanent impairment rating and award solely related to that injury. We affirm.

Boling has been employed by Owensboro Municipal Utilities ("OMU") for more than eighteen years. His duties include repairing auxiliary equipment associated with the power generating unit. The work is very physically demanding, requiring him to lift and carry heavy items, and frequently bend and squat. Boling sustained an injury to his low back while carrying a gear box down a flight of stairs in 2007. He underwent a surgery at L4-5 and was released to return to work without restrictions in June, 2008. Boling filed a Form 101 and, by agreement approved on September 23, 2008, settled the claim based upon a 13% impairment rating assigned by Dr. Neil Troffkin pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Medical benefits remained open.

Boling alleged a second low back injury occurred on December 26, 2013 while trying to position an actuator. He experienced pain in his back into his right leg. Boling was not under restrictions prior to the 2013 injury. Following the incident, his condition improved until April, 2014 when he began working twelve-hour shifts, seven days

per week during a turbine outage. During this period, he was performing a lot of heavy lifting, bending, stooping and working in awkward positions. Boling testified, "I started to notice some more back pain in my right buttocks, started going down my leg into my calf, and then it got to the point to where my foot was going numb."

Boling returned to Dr. A. Gayle Rhodes and was eventually referred to Dr. Troffkin who performed surgery in July, 2014. Boling was released to full duty work without restrictions on September 8, 2014 and returned to his same position. When asked how he was currently doing in his work, Boling stated, "I have good days and bad days, depends on what I do. The only pain I have now is on my right side. I have none - absolutely nothing on my left side." Boling denied any pain on the left side after 2008 or 2009.

OMU filed a medical dispute¹ and motion to reopen the 2007 claim on July 16, 2014. It supported the medical dispute with the report of Dr. Thomas Loeb. Dr. Loeb conducted a peer review on April 17, 2014 to address whether Boling's current diagnoses of low back strain, right sciatica, and L4-5 disc protrusion directly relate to

¹ OMU withdrew its medical dispute at the Benefit Review Conference but was permitted to rely on the evidence filed with the dispute in the present claim.

the December 26, 2013 injury. Dr. Loeb reviewed voluminous records and noted Boling had a herniated L4-5 disc on the left side in 2007 and underwent surgery. He was treated for low back pain in 2010 with right leg pain. A January 11, 2014 MRI revealed a new herniated disc or recurrent disc at L4-5 and right-side radiculopathy.

In addition to this history, Dr. Loeb noted Boling recovered spontaneously from the 2014 incident with conservative intervention and returned to full duty work on January 28, 2014 without any further findings of low back pain or any subjective complaints. He thus concluded the complaints in December 2013 were simply a natural progression of Boling's underlying and longstanding condition which began in 2007. Dr. Loeb did not believe Boling had a new injury in 2013, but only experienced a recurrence of the longstanding condition. Likewise, his recurrent symptoms in April 2014 would be part of the natural recurrence of the degenerative process at the L4-L5 disc space. Dr. Loeb indicated he would consider this to be an old injury and related his current symptoms to his 2006-2007 injury.

Both parties introduced medical records from Dr. Troffkin, who also testified by deposition on January 8, 2015. Dr. Troffkin released Boling a few months after the

2007 left L4-5 microdiscectomy surgery, and did not treat him again until May, 2014 when he complained of back and right leg pain. Dr. Troffkin reviewed a January 11, 2014 MRI which revealed a right paracentral L4-5 disc bulge. He also reviewed a May 22, 2014 MRI which revealed a right sided L4-5 disc bulge with compression of the L5 nerve root. Dr. Troffkin performed a microdiscectomy on the right at L4-5 on July 16, 2014. He found a previously undetected free fragment of disc material on the right side. Dr. Troffkin could not say how the free fragment occurred, but opined the complaints and need for the most recent surgery are related to the December, 2013 work injury. He released Boling to return to full duty work on August 28, 2014. Based upon the surgery, Dr. Troffkin assessed a 10 to 13% impairment rating pursuant to the AMA Guides.

Furthermore, Dr. Troffkin did not believe Boling had a recurrent disc herniation because the most recent herniation was on the right side whereas the prior surgery was on the left side. Dr. Troffkin acknowledged Boling would have fallen into the same category under the AMA Guides and his impairment rating is probably the same as it was prior to the most recent injury.

Boling introduced Dr. Rhodes' medical records. He presented on December 27, 2013 with complaints of pain in his back on the right side, radiating into the thigh and groin region. He noted a history of right sided back pain three years earlier which resolved after physical therapy. Dr. Rhodes also noted the prior herniation at L4-5 which required surgery. He diagnosed a low back strain with some mild right radicular symptoms, and did not believe Boling's symptoms were related to a herniated disc.

On January 13, 2014, Boling reported to Dr. Rhodes his condition was somewhat improved. An MRI showed minimal right paracentral disc protrusion at L4-5 with slight right lateral recess stenosis without frank disc herniation or significant central canal stenosis. On January 28, 2014, Boling reported he was no longer having pain, weakness or numbness in his legs. Boling was released to a trial of full duty work and directed to follow-up only if he had problems. Boling returned on April 8, 2014 when he started to notice significant back pain that progressed to his right leg and became unremitting three days earlier. On April 10, 2014, Dr. Rhodes referred Boling to Dr. Troffkin for evaluation and treatment.

After reviewing the evidence, the ALJ noted it was uncontroverted that Boling had a 13% impairment rating as a result of the 2007 injury. However, OMU provided no evidence Boling was symptomatic as a result of that injury prior to the 2013 incident. Thus, OMU failed to meet its burden of proving an active disability pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). The ALJ then found as follows regarding the extent of Boling's injury:

12. The ALJ finds that all of the credible medical evidence in this matter supports the conclusion that the Plaintiff suffered a temporary exacerbation of his prior work-related injury.

13. Dr. Loeb opined that the Plaintiff's most recent treatment and condition were related to the 2007 injury. Likewise, Dr. Rhodes opined that the December 2014, incident brought his prior back condition to disabling reality. Finally, Dr. Troffkin opined that there was no increase in impairment as a result of the second surgery.

14. When considering these opinions, the ALJ is convinced by the opinion of Drs. Loeb and Rhodes that the December incident was a temporary exacerbation of the prior 2007 injury. The ALJ further finds that per the opinion of Dr. Troffkin, no additional permanent impairment rating is warranted. The ALJ finds that the Plaintiff suffered a temporary exacerbation of the prior injury.

Boling filed a petition for reconsideration requesting the ALJ to reconsider his finding that the 2013 injury was only a temporary exacerbation of the 2007 injury. Because the ALJ determined OMU failed to prove a pre-existing active condition, Bowling reasoned the 2013 injury must be viewed as a new injury entitling him to an award based upon a 13% impairment rating. By order dated July 9, 2015, the ALJ denied Boling's petition for reconsideration as a re-argument of the case.

On appeal, Boling argues he sustained a distinct injury in December 2013 entitling him to a permanent impairment rating solely attributable to that injury. He notes Dr. Troffkin explicitly stated the right-sided herniation and radiculopathy did not result from a recurrent disc because it involved a different side. Rather, Boling contends the 2013 incident produced a new injury requiring a specific new surgery that is ratable by itself. Furthermore, he argues Dr. Loeb's opinion is not persuasive because he "had no real history of the severity of the traumatic event causing the injury" and his opinion predated significant treatment.

As the claimant in a workers' compensation proceeding, Boling bore the burden of proving each of the

essential elements of his cause of action, including the extent and duration of disability. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in his 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 that which 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).

In determining Boling sustained a temporary injury, the ALJ relied upon Dr. Loeb's opinion. Dr. Loeb explicitly concluded the December 2013 incident was only a temporary exacerbation that resolved in late January 2014. Dr. Rhodes' January 28, 2014 note confirms that Boling reported he no longer had weakness, pain or numbness in his legs. Dr. Loeb reviewed extensive medical records and noted Boling had similar complaints of right leg pain in 2010 that had resolved after treatment.

Boling's argument is predicated on his belief that the recurrence of symptoms in April 2014 must be attributed to the December 2013 incident at work. Dr. Troffkin held that view, but Dr. Loeb reviewed Dr.

Troffkin's records from April 2014 and did not view Boling's symptoms at that time as being related to the December 2013 incident. In this regard, the medical proof identified two differing causes of Bowling's 2014 condition. Therefore, it cannot be said the record compels a finding the symptoms present in April 2014 or the surgery necessitated by those symptoms relate to the December 2013 incident. The ALJ exercised his discretion as fact-finder in finding Dr. Loeb's opinion more persuasive. 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). 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).

Because the record does not compel a finding the April 2014 symptoms and the subsequent surgery are related to the December 2013 incident, a permanent impairment rating related to that incident is not required. Although the ALJ addressed the issue of pre-existing active

disability and found in Boling's favor on that issue, an analysis pursuant to Finley v. DBM Technologies was not required because the ALJ was not convinced the work-related event caused a permanent injury or contributed to the permanent impairment. Stated otherwise, the failure to establish a prior active disability or impairment is not dispositive as to the question of whether Boling sustained a permanent injury. Instead, it is within the ALJ's discretion to conclude Bowling suffered a temporary injury. Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

Accordingly, the May 22, 2015 Opinion and Award and the July 9, 2015 order denying Boling's petition for reconsideration rendered by Jonathan R. Weatherby, Administrative Law Judge, are hereby **AFFIRMED**.

Finally, Boling requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED** the request is **DENIED**.

REBEKKAH B. RECHTER, MEMBER
WORKERS' COMPENSATION BOARD

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SCOTT M MILLER
PO BOX 685
SHEPHERDSVILLE, KY 40165

COUNSEL FOR RESPONDENT:

HON SHERRI KELLER
300 E MAIN ST, STE 400
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

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