Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 16, 2014

CLAIM NOS. 201200650 & 200801207

RONALD CHARLES PETITIONER

VS. **APPEAL FROM HON. GRANT ROARK, ADMINISTRATIVE LAW JUDGE**

LOUISVILLE METRO GOVERNMENT
and HON. GRANT ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Ronald Charles ("Charles") appeals from the January 7, 2013 Opinion and Order and the February 25, 2013 Order on Petition for Reconsideration rendered by Hon. Grant Roark, Administrative Law Judge ("ALJ"), awarding increased permanent partial disability benefits for the worsening of Charles' 2006 low back injury. Charles argues

the ALJ erred in denying vocational rehabilitation benefits and in failing to find his increased impairment was the result of a second injury occurring in 2010. For the reasons set forth below, we affirm.

Charles was employed as a police officer with the Louisville Metro Police Department. He sustained a back injury on October 15, 2006 when he slipped and fell down a slope while chasing a suspect. In the original claim, Charles filed the report of Dr. Tinsley Stewart. He noted an MRI revealed a left paracentral disc protrusion causing mild left lateral recess and foraminal encroachment; a left and right bulge at L4-5 with no impingement or encroachment; and a left paracentral and posteriolateral protruding disc at L5-S1, superimposed on milder annular disc bulging. Dr. Stewart diagnosed mechanical back pain with radicular component as a result of the work injury. He assigned a 10% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

In a March 20, 2009 report, Dr. Timir Banerjee diagnosed lumbar disc degeneration and back pain. He concluded Charles' lumbar disc degeneration was brought into disabling reality by the 2006 work injury. Dr. Banerjee placed Charles in DRE category II and assigned a

5% impairment rating pursuant to the AMA Guides, attributing 50% of the impairment to pre-existing disc degeneration. However, he stated Charles had a 0% active impairment at the time of the injury. Dr. Banerjee stated Charles' restrictions would preclude work as a police officer.

The parties entered a compromised settlement, approved July 20, 2009, based upon a 7.5% impairment with no multiplier. Charles filed a motion to reopen on May 17, 2012, alleging a change of disability shown by objective medical evidence. He also filed a claim for an alleged second injury to his back occurring on May 20, 2010 when a suspect became combative. Charles fell, straining his back when he landed on the prisoner.

Charles supported the motion to reopen and the new claim with the report of Dr. Gregory Gleis, who reviewed extensive medical records and performed an examination on June 29, 2011. He found Charles had a 7% DRE category II impairment rating pursuant to the AMA Guides following the 2006 injury. Dr. Gleis calculated Charles' current impairment at 13% based on the AMA Guides using the range of motion model. Dr. Gleis used the ROM method "since it is a second injury." Subtracting the 7% rating from the current 13% rating, Dr. Gleis found Charles

had “6% WPI for the increase [sic] impairment after 10/20/10 incident.”

Dr. Ellen Ballard performed an independent medical examination on July 14, 2011 and diagnosed chronic back pain with lumbar degenerative disc disease at L5-S1. Dr. Ballard stated there was no evidence Charles had a change in his impairment rating. She indicated Charles did not have the ability to return to work as a police officer.

Charles testified he was able to perform the duties of a detective for one and a half years following the first injury. He believed he was capable of returning to a desk job, but indicated he would have to pass the police officer’s proficiency test to retain his state certification. He did not believe he could perform the physical requirements of that test.

The ALJ determined Charles had a 7% impairment rating at the time his 2006 injury claim was settled, and would not have been entitled to any multiplier. Relying on the opinion of Dr. Gleis, the ALJ found Charles currently has a 13% impairment. He concluded the increase in impairment is related to a worsening of the 2006 injury. Finally, the ALJ determined Charles is not entitled to vocational rehabilitation because his work as a police officer and his college degree render him qualified to

return to some form of sedentary employment that is compatible with his physical restrictions and his previous training and experience.

Charles filed a petition for reconsideration making the same arguments he raises on appeal. On reconsideration, the ALJ indicated the denial of vocational rehabilitation benefits was adequately explained in the opinion. The ALJ also stated the finding of a worsening of the 2006 injury, rather than a new injury, was supported by the totality of the evidence.

On appeal, Charles argues he is entitled to vocational rehabilitation benefits because every physician of record has stated he can no longer work as a policeman, and he has been unable to obtain employment within his educational field and area of experience. He testified he cannot do field work in anthropology and would need a Master's Degree to obtain a supervisory position. Charles notes he has applied for nearly one hundred jobs but has been unable to secure employment that would provide earnings comparable to his earnings at the time of his injury.

KRS 342.710 states as follows:

> (1) One of the primary purposes of this chapter shall be restoration of the injured employee to gainful employment,

> and preference shall be given to returning the employee to employment with the same employer or to the same or similar employment. . .
>
> (3) . . . When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment. In all such instances, the administrative law judge shall inquire whether such services have been voluntarily offered and accepted. The administrative law judge on his or her own motion, or upon application of any party or carrier, after affording the parties an opportunity to be heard, may refer the employee to a qualified physician or facility for evaluation of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation.

In Wilson v. SKW Alloys, Inc. 893 S.W.2d 800 (Ky. App. 1995), the Kentucky Court of Appeals defined "work for which [the claimant] has previous training or experience" must be suitable employment. The Court defined "suitable employment" as:

> work which bears a reasonable relationship to an individual's experience and background, taking into consideration the type of work the person was doing at the time of injury, his age and education, his income level and earning capacity, his vocational

> aptitude, his mental and physical abilities and other relevant factors both at the time of the injury and after reaching his post-injury maximum level of medical improvement.
> Id. at 802.

The determination of whether a claimant can return to suitable employment is a factual determination solely within the discretion of the ALJ as fact-finder. Carnes v. Parton Bros. Contracting, Inc., 171 S.W.3d 60 (Ky. App. 2005). The determination is not limited to the specific job the worker was performing at the time of the injury. Here, the ALJ was convinced Charles' education and experience would permit him to secure other suitable employment. He has experience as a detective and testified he could perform desk work. The ALJ could reasonably conclude Charles' intellectual, investigative and organizational skills would readily transfer to other positions. The evidence falls short of compelling a finding of entitlement to vocational rehabilitation benefits.

Charles argues he is entitled to a 425 week award of permanent partial disability benefits based upon a 6% impairment for the 2010 injury. He notes the Benefit Review Conference Order contained a stipulation a work–related injury occurred on May 20, 2010. Charles further

emphasizes he was able to perform the work of a detective until after the 2010 incident. Dr. Gleis found the second injury resulted in the additional 6% impairment rating. Charles contends this report is the only direct testimony addressing whether there was a new injury or a worsening of the first injury.

The record contained substantial evidence establishing Charles had a worsening of his condition prior to the alleged second injury in 2010. In his November 30, 2009 record, Dr. Wayne Villanueva noted Charles was referred to discuss possible disc surgery. Charles stated his symptoms were worsening. In his May 25, 2010 note, Dr. Michael Casnellie referred to a December 2009 MRI which showed "tremendous disc space collapse at L5-S1." The MRI was obtained because Charles was experiencing more tingling in his lower extremities. The ALJ was well within his authority as fact-finder in determining the increased impairment is related to the 2006 injury rather than the 2010 incident. Although the ALJ selected the impairment rating assessed by Dr. Gleis who attributed the additional impairment to a second injury, the ALJ was free to reject Dr. Gleis' opinion as to the cause of the increase in impairment. The ALJ, as fact-finder, has the discretion to determine whom and what to believe. Caudill v. Maloney's

Discount Stores, 560 S.W.2d 15 (Ky. 1977). The ALJ may 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). Because the outcome chosen by the ALJ is supported by the evidence, we are without authority to disturb his decision on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Charles is correct in noting the parties stipulated the occurrence of a second injury. However, the stipulation to the occurrence of a work-related injury on May 20, 2010, did not establish liability for permanent partial disability benefits or future medical expenses. The stipulation to occurrence of an injury does not mean it was a permanent injury or that it produced impairment. Charles has not argued for an award of temporary income or medical benefits for the second injury, but only argues entitlement to permanent benefits for the second injury. Since the ALJ determined the worsening of Charles' condition was related to the first injury and there is no issue concerning temporary benefits for the second injury, no additional findings are necessary in this case.

Accordingly, the January 7, 2013 Opinion and Order and the February 25, 2013 Order on Petition for

Reconsideration rendered by Hon. Grant Roark, Administrative Law Judge, are **AFFIRMED**.

ALL CONCUR.

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