OPINION ENTERED: November 29, 2011

CLAIM NO. 201098769

TRINITY JASON MOORE PETITIONER

VS. **APPEAL FROM HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE**

GRAYCOR INDUSTRIAL CONSTRUCTORS, INC.
and HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Trinity Jason Moore ("Moore") appeals the June 24, 2011, opinion and order and the August 10, 2011, order ruling on his petition for reconsideration rendered by Hon. Lawrence F. Smith ("Smith"), Administrative Law Judge ("ALJ"), dismissing Moore's physical and psychological injury claim.

Moore's Form 101 indicates on January 9, 2010, he slipped on ice and fell down the steps while walking out of a tool trailer. Moore allegedly sustained injuries to his back, right leg, and right heel. Moore reserved the right to add an emotional component. On January 28, 2011, Moore filed a "Motion to Amend 101 to Add Emotional Component" which was sustained by order dated February 21, 2011.

The April 12, 2011, Benefit Review Conference ("BRC") order lists the following contested issues:

> Capacity to return to former work; Causation/work relatedness; Extent and duration; Injury as defined by the Act; Failure to pay medical expenses; Pre-existing active disability; under payment of TTD as to rate; Vocational rehabilitation; Future medicals.

Regarding whether Moore sustained an injury as defined by the Act in the June 24, 2011, opinion and order, the ALJ determined as follows:

> **Did the plaintiff sustain an injury as defined by the Act?** The plaintiff argues that he slipped and fell at work, sustaining a herniated disc and resulting in a 21% physical impairment and an 8% psychological impairment. The defendant argues that the plaintiff's condition entirely pre-existed his alleged fall, and the plaintiff's evaluating physicians based their assessments on an incomplete and misleading history.

> The claimant has the burden of proving each element of his claim with clear and substantial evidence. [citations omitted]. In the present case the plaintiff's treating neurosurgeon, Dr. Powell, changed his opinion as to causation after reviewing Dr. Frederick's treatment records. I note that during the most recent period of intensive treatment with Dr. Frederick, the plaintiff was not working anywhere. I note, too, as Dr. Powell pointed out, that the plaintiff's symptoms with Dr. Frederick were substantially the same as those he reported to Dr. Powell, symptoms that the plaintiff states began when he fell at work just ten days after he last treated with Dr. Frederick.
>
> It appears that neither Dr. Herr nor Dr. Nadar reviewed Dr. Frederick's records, and the plaintiff told both of those evaluators that he had been asymptomatic prior to the work accident. A medical opinion on causation that is based on a substantially inaccurate or largely incomplete history does not constitute substantial evidence. *Cepero v. Fabricated Metal*, 132 S.W.2d 839, 842 (Ky. 2004). Considering all the evidence, I am persuaded by the final opinion of Dr. Powell, as supported by Dr. Primm, that the plaintiff sustained no harmful change as a result of falling at work. For these reasons I find that the plaintiff did not sustain an injury as defined by the Act. I am further persuaded by the opinion of Dr. Shraberg that the plaintiff has not sustained a psychological injury. For these reason [sic], the plaintiff's claim is hereby DISMISSED WITH PREJUDICE.

On appeal, Moore argues the evidence compels the ALJ to award income and medical benefits for both his alleged physical and psychological injuries.

KRS 342.0011(1) defines "injury," in part, as follows:

> 'Injury' means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings....

The claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim, including proving an "injury" was sustained as defined by KRS 342.0011(1). Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Kentucky law holds when the party with the burden of proof before the ALJ was unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. In Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 735 (Ky. App. 1984), the Court of Appeals stated as follows:

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. See Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here, the ALJ determined Moore did not sustain an injury as defined by KRS 342.0011(1). In rejecting Moore's physical injury claim, the ALJ relied upon opinions rendered by Dr. James S. Powell. The record reveals Dr. Powell first saw Moore on February 10, 2010, and at that time, Dr. Powell received a history consistent with Moore being "asymptomatic" until going down the icy steps at work. At the time of Dr. Powell's February 10, 2010,

report, he believed while Moore did have "some preexisting degenerative spondylotic changes with degenerative bulging at 4-5 and 5-1 with spurring," he did "not believe this is the competent source of his pain." Rather, Dr. Powell believed Moore sustained a "new herniated disc at L3-L4." However, on March 9, 2011, after reviewing certain records from Dr. Michael Frederick, D.C., Dr. Powell opined Moore's alleged physical injury is pre-existing and active. Concerning Dr. Frederick's records, Dr. Powell stated as follows:

> These records document a pre-injury chronic pattern of low back complaints with pain radiating down Mr. Moore's leg to his calf. Those records reflect that in the months of November and December 2009, just prior to Mr. Moore's alleged work-related injury, he was seen by chiropractor Frederick seven times with complaints of low back pain and pain radiating down his leg into his right calf. These are essentially the same symptoms he presented to me upon my examinations.

Dr. Powell further opined as follows:

> With this new information, it is now my opinion that Mr. Moore had an ongoing active low back condition that existed before any alleged work-related injury on January 9, 2010. The symptoms described to me, being similar in nature to those described in chiropractor Frederick's records, low back pain radiating down the right leg to the calf, are consistent with a disc herniation. Therefore, I believe that

> Mr. Moore had a pre-existing disc herniation in his lumbosacral spine that was active and causing him symptoms of pain and discomfort, before any alleged work-related injury. Giving the patient the benefit of doubt and assuming an incident occurred, it appears to be a temporary aggravation of his chronic low back and right leg conditions, not a new injury.

Pursuant to the Fifth Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), Dr. Powell assessed a 5% impairment to the body as a whole with all of the impairment deemed "pre-existing and active." Dr. Powell concluded as follows: "In other words, I do not believe that the incident he has alleged having occurred at work, increased his impairment rating."

With the above-cited evidence from Dr. Powell in the record, this Board has no authority to disturb the ALJ's decision, as this evidence comprises substantial evidence in support of the ALJ's dismissal of Moore's physical injury claim. As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). Moore's assertion the ALJ

"erred when he relied upon the opinion of Dr. Powell who is the one (1) doctor who changed his opinion" also lacks merit. The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Where there exists a difference of opinions among the medical experts, and “the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe.” Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Additionally, in the June 24, 2011, opinion and order, the ALJ clearly indicated the physician’s opinions upon which he relied in dismissing Moore's claim. The ALJ sufficiently apprised the parties of the basis for his decision.

Moore's assertion the ALJ erred by not making "specific findings of fact as to why he relied upon Dr(s) Powell and Shraberg instead of Dr(s) Zerga, Herr, Nadar and Johnson as well as all the Doctor [sic] opinions set forth in Petitioner's brief" has no merit. While the ALJ’s decision must adequately communicate the evidence upon which his ultimate conclusions are drawn so the parties may

discern the basis of his decision, the ALJ is not required to engage in a detailed "discussion and analysis of either the evidence or the law." Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 531 (Ky. 1973). Here, the ALJ adequately apprised the parties and this Board of the basis of his decision to dismiss Moore's physical injury claim- i.e. the ALJ relied upon the opinions of Dr. Powell. Additionally, the ALJ *specifically* set forth why he did not rely upon the opinions rendered by Drs. Herr and Nadar, as set forth verbatim herein. The ALJ's ruling will not be disturbed.

Concerning the dismissal of Moore's psychological injury claim, in the June 24, 2011, opinion and order, the ALJ indicated he relied upon the opinions of Dr. David Shraberg. Dr. Shraberg's March 30, 2011, independent medical evaluation ("IME") report, filed as Exhibit 2 to Dr. Shraberg's April 7, 2011, deposition, outlines the following diagnoses:

> Axis I Adjustment Disorder of Adult Life due to occupational uncertainty, resolved. Mild elements of a mood disorder induced by Lortab, reversible.
>
> Axis II Elements of passive-dependent personality with avoidant and somatic features associated with symptom magnification.

> Axis III Past history of Lasik surgery 2007. Smoking related throat polyp, removed in 2009. Chronic mechanical low back pain dating back to at least 2007, with elements of lumbago with a temporary exacerbation associated with lumbar sprain of January 9, 2010 with residual chronic mechanical low back pain nondisabling.
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> Axis IV Stressors: Unemployment, fixed income, lifestyle.
>
> Axis V GAF (baseline) 80.

Dr. Shraberg assessed a 0% permanent psychiatric impairment rating pursuant to the Second Edition of the AMA Guides. Dr. Shraberg next opined as follows:

> I do not believe that there are any permanent elements of a mood disorder or anxiety based on an adjustment disorder associated with this pain or not working in that I do not believe the pain raises the level of causing a mood disorder, particularly with the iatrogenic reversible effect of his narcotic regimen. There is a wide variety of jobs he could hold, so his complaint that he feels useless and not being able to work is contradicted both by reasonable restrictions imposed upon him and with the medical records.

This evidence constitutes substantial evidence which supports the ALJ's dismissal of Moore's psychological injury claim. Therefore, this Board is without authority to disturb the ALJ’s decision on this issue.

Accordingly, the June 24, 2011, opinion and order and the August 10, 2011, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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