

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: May 16, 2014

CLAIM NO. 201387986

VOITH INDUSTRIAL SERVICES, INC.

PETITIONER

VS.

APPEAL FROM HON. WILLIAM RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

MICHAEL CHAPMAN  
and HON. WILLIAM RUDLOFF,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**RECHTER, Member.** Voith Industrial Services, Inc. ("Voith") appeals from the November 21, 2013 Opinion and Order and the December 27, 2013 Opinion and Order on Reconsideration rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"). The ALJ found Michael Chapman ("Chapman") is permanently totally disabled due to a work-related injury. Voith argues the ALJ erred in allowing the filing

of a supplemental report from Dr. Warren Bilkey, in relying on reports from Dr. Warren Bilkey, and in finding Chapman permanently totally disabled. For the reasons set forth herein, we affirm.

Chapman, born June 19, 1954, completed the eleventh grade and obtained a GED while in the army. He testified he began working as a maintenance worker for Voith in 2008 when it took over the plant maintenance operation at Ford from Univar. Chapman had a management job with Univar that involved 90% office work. The job with Voith was not in management and involved breaking down boxes, picking up cardboard, baling it, and picking up garbage. He had to push a heavy cart. Chapman had also worked on the restroom route which involved sweeping and mopping. His past employment includes work primarily in maintenance and as a cook. Chapman has been an owner/operator of a barbecue business, performing all aspects of the business. He had a carpet cleaning business which he described as physically demanding.

Chapman testified he was injured on April 1, 2013 when his supervisor, Mr. Strickland, asked him to ride in a golf cart to a different location in the plant. Chapman was in the process of sitting down in the cart when it took off "like a banshee" jerking him. Approximately fifteen or

twenty minutes after the incident, he noticed "pains and the restrictions coming in my body."

Chapman has constant throbbing and aching pain in his neck and back with radiation into his arms and legs. He described difficulties cleaning carpets and hardwood floors at home and while working in the yard. Chapman indicated he was unable to perform his past work at Voith or as a carpet cleaner. Sitting or standing for prolonged periods bother him. Chapman's pain interferes with his sleep, limiting him to three to five hours per night.

Chapman acknowledged injuries in motor vehicle accidents in 1986, 2000 and 2001. He stated he recovered from the accidents and received no medical treatment and took no medication for his neck or back from 2004 through 2013. During that time, he was able to work "without any problem at all." He admitted he had swelling that persisted in one side of his neck following the accidents, but it was worse and affected both sides of his neck following the work injury.

Dr. Warren Bilkey evaluated Chapman on June 18, 2013. He conducted a physical examination and reviewed medical records concerning treatment for the work injury as well as the motor vehicle accidents. Dr. Bilkey diagnosed lumbar and cervical strains resulting from the April 1,

2013 work injury. With respect to Chapman's condition prior to the work injury, he explained:

It is unclear to me whether or not Mr. Chapman had an active impairment affecting either the neck or back prior to 4/1/13. While permanent work restrictions were issued by Dr. Werner, it appears that this was necessary for short term disability payments and may not be an actual indicator of Mr. Chapman's injuries with their functional consequences. Furthermore, it appears Mr. Chapman for at least the past 4 years, was able to carry out at least medium duty work. This would speak against there being an active impairment affecting either the neck or the back prior to 4/1/13.

Dr. Bilkey recommended a reconditioning exercise program and referral to either a physical medicine rehabilitation or pain management specialist. He indicated Chapman was not a candidate for surgery. Dr. Bilkey assigned temporary restrictions of light duty work with maximum lifting of fifteen pounds, avoidance of repetitive bending and the opportunity to sit or stand as symptoms dictate. Based upon the evaluation, Dr. Bilkey assigned an 11% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides"). Dr. Bilkey did not believe Chapman had reached maximum medical improvement ("MMI"). Dr. Bilkey indicated that, if Chapman received

further treatment, there may be a need to reassess the permanent impairment after MMI is reached. Dr. Bilkey also indicated "since there is a possibility of a prior active impairment affecting Mr. Chapman due to his prior injuries, there may be a need to carry out a permanent impairment rating according to the Range of Motion method." He noted further documentation would be necessary to re-evaluate permanent impairment in that regard.

Dr. Bilkey's October 21, 2013 supplemental report consisted of yes or no answers to a questionnaire. He indicated his diagnosis had not changed since the June 18, 2013 evaluation. Given that Chapman had not been able to follow through with treatment recommendations, Dr. Bilkey agreed Chapman was now at MMI and his impairment rating had not changed in any way. Dr. Bilkey indicated Chapman did not retain the physical capacity to return to his pre-injury duties as a maintenance worker.

Dr. Ellen Ballard examined Chapman on September 5, 2013. Dr. Ballard's impressions were history of chronic neck and back pain and history of multiple motor vehicle accidents. She opined Chapman's conditions were not related to the work incident. She did not recommend any treatment or restrictions related to the work incident, but indicated he had a prior restriction to sedentary duty.

Dr. Ballard opined Chapman had 0% impairment as a result of the work incident.

Based upon the totality of the evidence and specifically upon Chapman's testimony and the reports of Dr. Bilkey, the ALJ found Chapman sustained significant permanent injuries as a result of the work incident. Based upon that same evidence, the ALJ determined Chapman did not have a pre-existing active condition at the time of the work injury. The ALJ specifically noted Chapman's testimony that he had no medical treatment for his neck or back and took no medication from 2004 to 2013. The ALJ adopted the impairment rating assessed by Dr. Bilkey. After reciting the definition of permanent total disability and noting the considerations set forth in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the ALJ found as follows:

In the present case, I considered the seriousness of the plaintiff's work injuries on April 1, 2013, his age, his work history, his education, the credible and convincing testimony of the plaintiff and the specific medical opinions of Dr. Bilkey regarding the plaintiff's occupational disability. All of this evidence is covered in detail above. Based upon all of those factors, I make the factual determination that the plaintiff Chapman cannot find work consistently under regular work circumstances and work dependably. I, therefore, make

the factual determination that he is permanently and totally disabled.

Voith filed a petition for reconsideration raising the same arguments it makes on appeal. The ALJ rendered his Opinion and Order on Reconsideration on December 27, 2013 denying Voith's petition. The ALJ noted Chapman was now 59 years old and did not complete high school, though he earned a GED. His past work as a carpet cleaner was a physical labor job. The ALJ noted Chapman's testimony that neck and back pain significantly affected his activities of daily living and he was not physically capable of performing his former jobs. The ALJ reaffirmed that, based upon the seriousness of the work injuries, his age, his work history, his education, Chapman's credible testimony, and the specific opinions from Dr. Bilkey regarding occupational disability, Chapman cannot find work consistently and dependably under regular circumstances. The ALJ held Dr. Bilkey's second report was valid rebuttal evidence pursuant to Estill County Farm & Home Supply Co. v. Palmer, 416 S.W.2d 752 (Ky. 1967) and Ajax Coal Co. v. Collins, 106 S.W.2d 617 (Ky. 1937). Finally, the ALJ noted Voith failed to file a motion for more proof time to cross-examine Dr. Bilkey about the rebuttal report.

On appeal, Voith argues the ALJ erred in allowing the introduction of Dr. Bilkey's supplemental report, which did not constitute rebuttal evidence. Voith also argues the ALJ erred in relying on evidence from Dr. Bilkey that was inconsistent with the AMA Guides. Voith notes Dr. Bilkey acknowledged Chapman had previous motor vehicle accidents resulting in persistent neck and back pain and tightness in the trapezius. Dr. Bilkey based his impairment rating on the condition at the time of the evaluation, but noted it was a preliminary calculation and Chapman was not at MMI. Further, he did not provide a rating using the preferred range of motion method.

It has long been accepted that the ALJ, as fact-finder, has the authority to control the taking and presentation of proof, and it is not unreasonable for an ALJ to either permit additional proof to be presented or prohibit evidence in order to maintain a reasonable element of administrative due process. See Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005); Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Moreover, one of the purposes of the Act is to facilitate the speedy resolution of disputes, and the ALJ has a duty to determine all disputes in a summary manner. Searcy v. Three Point Coal Co., 134 S.W.2d 228, 231. In discharging rulings as

both gatekeeper of the record and fact-finder, an ALJ may not act in an arbitrary or unreasonable manner such as to indicate an abuse of discretion. Yocom v. Butcher, 551 S.W.2d 841, 844.

It is generally accepted the rules of evidence are relaxed in administrative actions and the concept of constitutional due process in administrative matters is flexible. Perkins v. Stewart, 799 S.W.2d 48, 51 (Ky. App. 1990). The Kentucky Rules of Evidence ("KRE") are incorporated by reference in the administrative regulations accompanying KRS Chapter 342. However, the presentation of proof in Kentucky workers' compensation proceedings is somewhat more indulgent than in civil court actions. See 803 KAR 25:010 §14. As trier of fact, the ALJ is the gatekeeper and arbiter of the evidence, both procedurally and substantively. Dravo Lime Co., Inc., id. The ALJ is empowered under KRS 342.230(3) to "make rulings affecting the competency, relevancy, and materiality of the evidence about to be presented and upon motions presented during the taking of evidence as will expedite the preparation of the case." The ALJ as fact-finder has the authority to control the taking and presentation of proof.

Here, we do not believe the ALJ committed an abuse of discretion in allowing the submission of the

contested report. There was very little that was new in Dr. Bilkey's supplemental report. He did not present any new diagnosis and reaffirmed the prior impairment rating. As in the original report, he indicated Chapman was not capable of returning to his pre-injury duties as a maintenance worker. In the original report, Dr. Bilkey placed Chapman in DRE Category II for both the cervical and lumbar strains. Placement in a DRE category establishes the possible range of impairment which would not change. Because Chapman was not a surgical candidate, Dr. Bilkey was capable of placing Chapman into a DRE category even though he was not at MMI. Dr. Bilkey indicated there was a *possibility* the impairment rating could change with additional treatment, but the record established Chapman did not receive that treatment. Thus, even without the supplemental report, the ALJ could infer the impairment rating would not have changed.

Although Voith objected to the introduction of the report, as noted by the ALJ it failed to move for additional proof time to challenge the report. Further, Voith's counsel stated at the hearing that its brief adequately addressed Dr. Bilkey's opinions. We believe the ALJ acted within his discretion as gatekeeper concerning

the taking of evidence as provided for by statute. Dravo Lime Co., Inc., id.

Voith argues Chapman's problems related to the work incident do not justify a finding of permanent total disability. It contends Chapman failed to prove the work incident caused any new permanent injury and his current symptoms are the same as those he experienced after his motor vehicle accidents. Voith believes Chapman remains capable of performing the management job he held with Univar and notes his work with Voith was not physically demanding. Voith argues the more credible evidence compels a finding Chapman's current complaints are related to pre-existing ongoing problems and, at most, he is entitled to an award of permanent partial disability benefits.

The Court of Appeals in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), instructed that in order for a pre-existing condition to be characterized as active, it must be both symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. Finley, id.

Here, no evidence indicates Chapman received medical care or took any kind of medication for his neck or

back for a nine year period prior to the work injury. No doctor of record opined Chapman's condition was impairment ratable immediately prior to the work injury. Chapman testified he was able to perform his job duties during that time without any problems. As noted by Dr. Bilkey in his original report, Chapman's ability to carry out at least medium work for at least four years prior to the work injury "would speak against there being an active impairment" for either the neck or back prior to the work injury. Based on this evidence, the ALJ could reasonably conclude Chapman had no pre-existing impairment or occupational disability.

Authority has long acknowledged an ALJ has wide ranging discretion in granting or denying an award of permanent total disability. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006). It is not the Board's role to re-weigh the evidence. When the ALJ's findings are supported by substantial evidence, the Board may not disturb those findings. Chapman is an older worker who has been primarily engaged in physical labor. Although his job with Univar was mainly a management position, he also performed some physical labor. Additionally, Chapman, whom the ALJ found credible, testified his back and neck cause problems with prolonged sitting. Thus, Chapman's ability

to perform even sedentary work would be impacted. Because it is clear from the ALJ's opinion, award and order he was laboring under no material misimpression as to the evidence or pertinent law, we affirm.

Finally, Voith requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, the request is **DENIED**.

Accordingly, the opinion, order and award rendered by Hon. William J. Rudloff, Administrative Law Judge, on November 21, 2013, as well as the order on reconsideration dated December 27, 2013 are hereby **AFFIRMED**.

ALL CONCUR.

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REBEKKAH B. RECHTER, MEMBER  
WORKERS' COMPENSATION BOARD

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