

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: October 18, 2013

CLAIM NO. 200999663

WEBSTER COUNTY COAL, LLC

PETITIONER

VS.

APPEAL FROM HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE

MARSHALL D. PARKER, SR.,  
MULTICARE MADISONVILLE,  
DEACONESS HOSPITAL,  
NEUROSURGICAL CONSULTANTS,  
DR. DAVID EGGERS,  
CENTER FOR ORTHOPAEDIC SERVICES,  
DR. JAMES M. DONLEY,  
WAYNE C. COLE, DO,  
KELLY L. COLE, DO,  
DR. ROBERT G. HOLZKNECHT,  
COOP HEALTH SERVICES,  
and HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

MARSHALL PARKER

PETITIONER

V.

WEBSTER COUNTY COAL, LLC  
and HON STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION AND ORDER  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING**

\* \* \* \* \*

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

**ALVEY, Chairman.** Webster County Coal, LLC (Dotiki Mine) ("WCC") seeks review of the opinion, award and order rendered February 21, 2013, by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), awarding medical benefits to Marshall D. Parker, Sr. ("Parker") and finding he was not entitled to additional income benefits pursuant to KRS 342.730(4). WCC also appeals from the June 12, 2013 order denying its petition for reconsideration. Parker also appeals the ALJ's decision.

On appeal, Parker argues the limitation of income benefits to 104 weeks pursuant to KRS 342.730(4) is unconstitutional. We have no authority to decide constitutional matters, and therefore decline to render an opinion regarding this issue.

On appeal, WCC argues the ALJ erred in finding Parker's low back condition compensable based solely on lay, not medical evidence. Because we conclude the ALJ's determination is supported by substantial evidence, we

affirm. However, because the ALJ failed to address the compensability of contested treatment for Parker's cervical spine, we remand for a determination regarding that issue, and to resolve additional medical disputes filed during the pendency of this appeal.

Parker filed a Form 101 on April 4, 2010 alleging injuries to his back, right hip and right knee when he slipped while crossing a belt he had finished repairing on September 8, 2008. Parker, a resident of Clay, Kentucky, testified by deposition on January 3, 2012 and at the hearing held November 16, 2012. At the time of the injury, he was 68 years old.

Parker's previous work experience includes farm labor, working at a saw mill and factory work. He began working for WCC, in a coal mine, in 1974. For several years he worked as a belt mechanic which entailed working with a heavy conveyor belt. Parker explained his work included splicing belts, as well as repairing the mechanical parts of the belt system including bearings, bed rollers, tandems and take up rollers. On September 8, 2008, Parker assisted in the repair of a broken belt. The worksite was very muddy, and as he attempted to cross the belt after it was repaired, his feet slipped, causing him

to fall. He stated he experienced a jerk to his low back, right hip and right leg.

Parker continued to work after the accident and he did not immediately seek medical attention, because he believed his symptoms would resolve. When the symptoms did not abate, he completed an accident report, and was referred to Dr. James Donley, an orthopedic. Dr. Donley subsequently performed surgery on his right knee. Parker stated he advised Dr. Donley of problems with his low back and right hip.

Parker testified he had previously experienced back pain on multiple occasions in the past, which resolved after treatment including epidural steroid injections. He stated he was experiencing no low back pain immediately before the work accident, and had received no treatment for a couple of years prior to that time. Parker testified he has continued to experience low back pain since the accident, and underwent surgery by Dr. David Eggers, a neurosurgeon in Owensboro, Kentucky in June 2011.

Parker stated the surgery improved his leg function, but his low back condition continued to worsen. He continues to experience numbness in his right foot, pain in his right hip and a sore tailbone.

Parker admitted he was paid more than two years of temporary total disability ("TTD") benefits following the accident. He is now retired.

In support of the Form 101, Parker filed Dr. Eggers' May 20, 2009 office note. Dr. Eggers noted, "He injured himself in September of 2008 at work where he slipped at work and injured his right knee at that time and has been having back and leg pain since then." On April 30, 2010, Dr. Eggers noted radicular pain and weakness, and recommended surgical decompression and possible instrumentation. On February 23, 2011, he noted intractable back pain and motor weakness. He recommended an MRI. On June 2, 2011, Dr. Eggers performed a decompression and posterior lumbar interbody fusion at L3-4. In a status report filed September 30, 2011, Dr. Eggers' office stated he could not make an assessment of maximum medical improvement ("MMI") or impairment rating until at least six months after the date of the surgery. In a Form 107-I medical report dated May 30, 2012, Dr. Eggers diagnosed displacement of a lumbar intervertebral disc without myelopathy; spinal stenosis, lumbar region, without neurogenic claudication; and acquired spondylolisthesis. He indicated Parker's injury was the cause of his complaints. He further indicated he could not

assess an impairment rating because Parker needed a functional capacity evaluation.

WCC filed records from Dr. Wayne Cole, Parker's family physician, for treatment from December 6, 1999 through October 20, 2009, many of which were illegible. Treatment was rendered at various times throughout that time period for neck pain, right shoulder pain, low back pain, groin pain, hoarseness, sore throat, head congestion, frequent urination, sleeping problems and injury to his ribcage. Dr. Cole's last notation of treatment for Parker's low back was January 5, 2004 when he noted an epidural steroid injection has been administered.

WCC filed the October 9, 2009 report of Dr. Russell Travis who noted Parker's injury date, right knee surgeries and complaints of low back pain. Dr. Travis noted multiple abnormalities in Parker's lumbar spine, and stated, "In my opinion this is work related." Dr. Travis subsequently reviewed additional records, and in a supplemental report dated November 20, 2009, stated as follows:

This confirms the fact that his current problem is not related directly to the injury of 9/8/2008, but is clearly a question of pre-existing severe degenerative changes with neural impingement and previous symptomatic problems with his low back.

WCC also filed the September 8, 2011 utilization review report of Dr. Bart Goldman. Dr. Goldman noted the history of knee injury, and stated as follows regarding Parker's low back condition:

That being said, I am in agreement with previous reviewers that the reason this surgery was performed was for a degenerative condition which pre-existed and was actively symptomatic prior to the injury in question.

WCC filed records from Tri-State Orthopedics in Evansville, Indiana for treatment from January 24, 2000 through October 26, 2006. Those records include notations of treatment for right arm and shoulder pain, neck pain, and low back pain. Parker treated for low back pain in 2003. On September 5, 2003, Dr. David McComis, an orthopedic surgeon, diagnosed Parker with degenerative disk disease of the lumbar spine with radicular symptoms. On January 14, 2004, Dr. McComis indicated Parker had reached MMI, was doing better with low back pain, and assessed no impairment rating. Parker again treated in 2005 for low back pain. On June 27, 2005, it was again noted his condition had improved and he had reached MMI with no impairment rating. In May 2006, Parker again had a flare-up of low back pain. On June 23, 2006, Parker's condition had improved to the point he required no additional

treatment. Parker later treated for cervical pain, but the notes reflect no subsequent treatment administered for low back pain.

Dr. William Gavigan, an orthopedic surgeon from Nashville, Tennessee, evaluated Parker on January 11, 2012. Dr. Gavigan diagnosed severe degenerative disk disease of the lumbar spine, especially at L3-4. He stated Parker sustained a strain on September 8, 2008, for which he had reached MMI. Dr. Gavigan assessed a 4% impairment rating due to Parker's right knee injury, and a 22% impairment rating for his lumbar condition, both pursuant to the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. He assessed no restrictions for the 2008 low back strain, and stated no additional treatment was necessary for that condition.

A benefit review conference ("BRC") was held on September 24, 2012. In the BRC order and memorandum, the issues preserved for resolution included benefits per KRS 342.730; work-relatedness/causation (back); notice (back); average weekly wage; unpaid or contested medical expenses; injury as defined by the act (back); exclusion for pre-existing disability/impairment (back); TTD; constitutionality of KRS 342.730 as it may be applied to

Parker; and reasonableness and necessity of medical expenses.

In the decision rendered February 21, 2013, the ALJ determined Parker sustained injuries to his right knee and low back in the September 8, 2008 accident. Regarding Dr. Eggers assessment of causation, the ALJ specifically stated as follows:

In the section requesting his medical opinion as to causation, Dr. Eggers checked "yes" in the box asking whether within reasonable medical probability plaintiff's injury was the cause of his complaints. Unfortunately, Dr. Eggers failed to complete the sections pertaining to the explanation of the causal relationship, impairment or restrictions.

The ALJ then stated:

No other physician, treating or examining, disagrees with Dr. Gavigan's rating of the knee. No other physician, treating or examining (except Dr. Eggers) disagrees with Dr. Gavigan's findings as to the lumbar spine. Dr. Eggers [sic] opinion is that the back injury is work-related to the 9/8/2008 traumatic event, but he failed to properly analyze his opinion as to causation or assign an impairment rating to the lumbar spine.

While the physicians of record in this proceeding are eminently qualified to opine on the etiology of a given medical condition, they are not qualified to opine on the legal effect. Here, the evidence is uncontested that the Plaintiff worked for a little more

than two (2) years immediately prior to the date of injury unhindered by the condition of his lumbar spine. It was only after the work-related accident of September 8, 2008 that his complaints of back pain and related symptoms led to the spinal fusion surgery unanimously approved by the physicians addressing the issue.

To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. Moreover, the burden of proving the existence of a pre-existing condition falls upon the employer.

Where work related trauma causes a dormant degenerative condition to become disabling and to result in a functional *Finley v. DBM Technologies*, Ky. App., 217 S.W.3d 261 (2007).[sic] impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of [sic]injury." *McNutt Construction v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001).

Here, the Defendant Employer does not dispute the Plaintiff's attendance record up to and including the date of the accident. A worker with an active disability does not work 70-80 hour weeks doing the type of work performed by this plaintiff. Thus, while Plaintiff's back condition may have been impairment ratable just prior to the date of injury, it was not actively symptomatic by both his own testimony and the Defendant Employer's records. A claimant's own testimony is competent and of some probative value. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d

15 (Ky., 1977). The only appropriate finding according to the evidence taken as a whole is that the Plaintiff did suffer a work related injury to both his knee and his lower back on September 8, 2008, both injuries were related to the work and there is no exclusion for pre-existing active disability/impairment of the back under the holding in *Finley* (supra).

The ALJ then found as follows:

As to the Plaintiff's lower back, the ALJ finds that the Plaintiff, MARSHALL D. PARKER, SR., suffered a work-related injury on September 8, 2008 while in the employ of the Defendant/Employer, WEBSTER COUNTY COAL, LLC. In making this finding, I have relied [sic] the medical records and opinions of Dr. William M. Gavigan, M.D., Dr. David Eggers, M.D., Dr. Russell Travis, M.D. and Plaintiff's sworn testimony which, concerning the work causation of Plaintiff's lower back injury, I find to be the most credible and convincing evidence in the record.

WCC filed a petition for reconsideration arguing the ALJ erred in basing his decision regarding causation solely on Parker's testimony since he had discredited Dr. Egger's opinion. In an order dated June 12, 2013, the ALJ denied the petition for reconsideration, determining, "there was no patent error appearing on the face of the opinion".

We will first address Parker's argument regarding the constitutionality of KRS 342.730(4) which provides for

the termination of benefits as of the date the employee qualifies for normal old age Social Security retirement benefits. This Board, as an administrative tribunal, has no jurisdiction to determine the constitutionality of a statute enacted by the Kentucky General Assembly. Blue Diamond Coal Co. v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Therefore, this Board, as well as the ALJ, lack the power and jurisdiction to review and determine the constitutionality of the statute. It is further noted the issue regarding the constitutionality of KRS 342.730(4) has previously been decided adversely to Parker's position in Keith vs. Hopple Plastics, 178 S.W.3d 463 (Ky. 2005). Because this Board has no authority to reverse rulings of the Kentucky courts, and has no jurisdiction, we can render no determination on this issue.

Regarding WCC's argument, since Parker was successful before the ALJ regarding the causation of his low back condition, the question on appeal is whether his determination is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by the ALJ, such evidence 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 weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). It is well established, an ALJ is vested with wide ranging discretion. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). So long as the ALJ's rulings are reasonable under the

evidence, they may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

That said, the ALJ must provide a sufficient basis to support his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973). We also find instructive the holding of the Kentucky Supreme Court in New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004), where the Court remanded the claim to the ALJ "for further consideration, for an exercise of discretion, and for an explanation that will permit a meaningful review."

While medical causation usually requires proof from a medical expert, the ALJ may properly infer causation, or a lack of causation, from the totality of the circumstances as evidenced by the lay and expert testimony of record. See Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., Ky. App., 618 S.W.2d 184 (1981); Cf. Union Underwear Co. v. Searce, 896 S.W.2d 7 (Ky. 1995). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). Causation is a factual issue to be determined within the sound discretion of the ALJ as fact finder. Union Underwear Co. v. Searce, supra; Hudson v. Owens, 439 S.W.2d 565 (Ky. 1969).

In this instance, we believe it was reasonable for the ALJ to infer from the totality of the circumstances evidenced by the lay and medical testimony Parker's back condition was caused by his work accident.

In Dravo Lime Co. v. Eakins, supra, the Kentucky Supreme Court stated "[o]ur courts have also held that a fact finder may, in piecing together the entirety of the testimony, conclude that causation has been established by viewing the totality of the circumstances, including the history related by the injured worker." Id. at 6. Hence, depending on the circumstances of the case under

consideration, the work history provided by the injured workers alone may be competent evidence sufficient to support a finding of work-related causation. Scorpio Coal Co. v. Harmon, 864 S.W.2d 882 (Ky. 1993).

Here, although the ALJ pointed to deficiencies in Dr. Egger's Form 107, his opinion regarding causation was not clearly rejected. As noted above, the ALJ stated Dr. Eggers clearly indicated Parker's current low back condition was caused by the work accident. The ALJ then indicated he relied upon Dr. Eggers in finding the low back condition compensable. While the ALJ could have more clearly explained the basis for his determination, his findings were minimally sufficient to support his determination Parker's low back injury is due to his work-related accident.

It is noted the ALJ provided a sufficient basis for rejecting WCC's argument Parker's low back condition was pre-existing and active prior to the accident. The records from Tri-State Orthopedics establish Parker's previous bouts of low back pain each resolved, and clearly refute WCC's argument regarding causation. There is no evidence he had any ongoing active low back condition for over two years prior to his work injury. Therefore, we determine the ALJ's determination is supported by

substantial evidence, and a contrary result is not compelled.

With that said, this Board is permitted to *sua sponte* reach issues even if unpreserved. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). It is noted WCC filed a medical dispute on January 27, 2012 concerning compensability of treatment for a cervical condition, for which no determination was ever issued. Likewise, it is noted additional medical disputes were filed by WCC during this appeal. We also note the ALJ issued an order on July 8, 2013, more than a week after this appeal was filed, joining additional parties. Since the ALJ had no jurisdiction to issue such order, the July 8, 2013 order is hereby **VACATED**, and we *sua sponte* remand this matter for a determination of outstanding medical disputes, and to determine whether additional parties should be joined. Although neither party raised this issue, KRS 342.285 clearly grants the Board the authority to decide questions of law regardless of whether they are raised on appeal. It is within the Board's province on appeal to assure orders and awards of an ALJ are in conformity with Chapter 342.

Finally, WCC requested an oral argument be held. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, the request is **DENIED**.

Accordingly, the opinion, award and order rendered February 21, 2013, and the order denying the petition for reconsideration rendered June 12, 2013, by Hon. Steven G. Bolton, Administrative Law Judge, are hereby **AFFIRMED**. This claim is **REMANDED** for determination of pending medical disputes in conformity with the views expressed herein.

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN  
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