Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 18, 2013

CLAIM NO. 200788580

WILLIAM D. HOWARD PETITIONER

VS. **APPEAL FROM HON. ALLISON EMERSON JONES, ADMINISTRATIVE LAW JUDGE**

WHAYNE SUPPLY CO.
and HON. ALLISON EMERSON JONES,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. William Howard ("Howard") seeks review of the opinion and order rendered March 11, 2013 by Hon. Allison Emerson Jones, Administrative Law Judge ("ALJ") denying his motion to reopen after determining his condition had not worsened since the initial December 21, 2009 opinion. Howard also seeks review of the April 30, 2013

order denying his petition for reconsideration. On appeal, Howard argues the ALJ erroneously relied upon the opinions of Drs. David Jenkinson and Russell Travis. Likewise, he argues the ALJ misconstrued the opinion of Dr. Robert Hoskins. We disagree and affirm because substantial evidence in the record supports the ALJ's determination and no contrary result is compelled.

This claim originated by Howard filing a Form 101 on October 6, 2008 alleging he injured his left foot, left knee and low back when he slipped and fell off a ladder attached to a truck while working for Whayne Supply Co. ("Whayne") as a rental technician on May 1, 2007. The Form 101 was later amended to include a psychological injury. Howard treated with Dr. George Chaney, his primary care physician, Dr. Phillip Tibbs, a neurosurgeon, and Dr. Greg D'Angelo, an orthopedic surgeon for his work injuries. Dr. D'Angelo repaired a torn meniscus of the left knee. Howard also attended physical therapy for both his low back and left knee.

In an opinion and award rendered December 21, 2009, Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ Wolff") determined Howard sustained compensable work-related injuries to his left knee and low back due to the May 1, 2007 accident. ALJ Wolff assessed a 1% rating for

Howard's left knee condition. Regarding the low back condition, ALJ Wolff found Dr. Jenkinson's opinion most persuasive and assessed a 5% impairment rating. ALJ Wolff dismissed the alleged psychological injury. He also determined Howard was not permanently and totally disabled, but did not retain the capacity to return to the type of work he performed at the time of injury. The ALJ awarded temporary total disability benefits, permanent partial disability ("PPD") benefits based upon a combined 6% impairment rating and increased by the three multiplier pursuant to KRS 342.730(1)(c)1, and medical benefits. Howard did not file a petition for reconsideration, and this Board affirmed the December 21, 2009 decision in an opinion rendered July 23, 2010.

Subsequently, Howard filed a motion to reopen on June 25, 2012 alleging his condition had worsened entitling him to an increase in PPD benefits. In support of his motion, he attached the June 22, 2012 affidavits of Howard and Dr. Hoskins, as well as a May 19, 2012 report by Dr. Hoskins. The Chief Administrative Law Judge determined Howard set forth a *prima facie* case for reopening and the claim was subsequently assigned to the ALJ.

Howard testified by deposition on August 14, 2012 and at the final hearing held January 10, 2013. Howard was

born on August 6, 1955 and is a high school graduate. He has vocational training as a heavy equipment mechanic, and is also a certified massage therapist. Howard worked at several positions with Whayne after he was employed in 1986. On May 1, 2007, Howard was a rental technician, which involved cleaning and repairing heavy equipment. He also performed administrative tasks. Howard also maintained concurrent employment as a massage therapist from 2001 to 2007 on a part-time basis. Howard has not worked since the May 1, 2007 accident. He currently receives workers' compensation benefits and Social Security disability benefits.

Howard injured his left knee and low back on May 1, 2007 when he fell from a ladder. Subsequent to the December 21, 2009 decision, Howard continued to treat with Dr. Chaney every three months for his work-related injuries. Howard explained Dr. Chaney "mostly just checks my reflexes and gives me exercises to do at home." Howard testified he is unable to take pain medication because it interferes with his heart medication. However, he is prescribed medication for back spasms. Howard has also attended physical therapy since the 2009 decision. Howard confirmed that subsequent to the May 2007 accident, he was involved in a motor vehicle

accident which caused back problems. He was treated at the emergency room at Hazard ARH with no follow-up care.

Howard testified his symptoms have worsened since the December 2009 opinion. He falls when he is walking up stairs and experiences left foot swelling, which “just about turns black - - when I get the pains in my back.” Howard cannot walk as far as he used to without having to sit. His back pain and spasms, located mostly around his right hip and groin area, have also worsened. He has difficulty performing many household chores. Howard testified he could not return to Whayne as a rental technician or work as a message therapist in his current condition.

In support of the motion to reopen, Howard filed the May 19, 2012 Form 107-I report of Dr. Hoskins, who examined him on May 14, 2012. Howard reported his low back symptoms have worsened since the 2009 opinion. Dr. Hoskins noted Howard had not seen any physicians other than Dr. Chaney and no new diagnostic studies have been administered since the 2009 opinion. Dr. Hoskins indicated he reviewed medical records dating from 2007 through 2012, as well as May 22, 2007 and January 20, 2009 lumbar spine MRIs.

Dr. Hoskins diagnosed lumbosacral sprain/strain; left lumbosacral radiculitis; L4-5 central and right-sided asymmetric disc bulging; and L5-S1 disc herniation and mild

bilateral neural foraminal encroachment. Dr. Hoskins opined Howard's injuries caused his complaints and stated his condition has deteriorated since the December 2009 decision. Dr. Hoskins concluded Howard's pain and restrictions have increased, and his worsened condition has resulted in greater occupational disability. Pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides"), Dr. Hoskins assessed an 8% impairment rating for Howard's lumbar condition and a 1% impairment rating for his left knee condition. Dr. Hoskins stated Howard does not retain the physical capacity to return to the type of work performed at the time of injury and imposed permanent restrictions. In an addendum dated the same day, Dr. Hoskins clarified he assessed an 8% impairment rating for the low back condition under the DRE category II and recommended updated diagnostic studies be performed.

Whayne submitted reports from Dr. Jenkinson who had evaluated Howard at its request during the initial litigation and again following the motion to reopen. In a June 16, 2008 report, Dr. Jenkinson diagnosed a torn medial meniscus and a "simple low back strain" with no evidence of lumbar radiculopathy. He also noted Howard exhibited symptom exaggeration regarding his low back. Dr. Jenkinson

opined the knee injury was caused by the May 1, 2007 work incident, but the low back pain complaints "can be related to his accident only by the patient's history." Dr. Jenkinson opined Howard had attained maximum medical improvement and could return to his former position without permanent restrictions. Dr. Jenkinson assessed a 1% impairment rating for the left knee condition. He also assessed a 5% impairment rating for the low back using Lumbar DRE category II, "which is a history compatible with his specific injury, some non-verifiable radicular complaints, but no objective abnormality." He also found no further medical treatment necessary for the low back injury. In an April 24, 2009 addendum, Dr. Jenkinson emphasized Howard showed no signs of radiculopathy. He also stated he was "somewhat overgenerous in view of this man's lack of objective spinal abnormality" in assessing a 5% impairment rating, but gave him the benefit of the doubt.

Following Howard's motion to reopen, Dr. Jenkinson re-evaluated Howard at Whayne's request on September 14, 2012. Dr. Jenkinson noted since the 2008 evaluation, Howard has regularly treated with Dr. Chaney but the treatment records had not been provided. Howard reported his condition had worsened, complaining of radiating low back pain, as well as numbness and swelling in his left foot.

Dr. Jenkinson found no objective abnormality to support Howard's subjective complaints. Dr. Jenkinson stated the physical examination was completely normal apart from signs of self-limiting behavior, and he found no clinical or radiological evidence for lumbar radiculopathy. He opined, "There is no evidence that there has been any significant change in this man's impairment since that decision of 2009." He further opined, "There is in fact no convincing evidence that Mr. Howard ever had any significant injury to his lumbar spine."

He also stated he found no basis to increase his previous assessment of impairment. He stated no further medical treatment is necessary for his work-related injuries. He also disagreed with and critiqued Dr. Hoskins' opinions.

In a November 8, 2012 addendum, Dr. Jenkinson stated he had been provided records from Dr. Chaney dating 2009 through 2012, as well as physical therapy records from 2010. After reviewing the records, Dr. Jenkinson stated his opinions found in the September 14, 2012 report remain unchanged. Dr. Jenkinson emphasized Dr. Chaney's records reflect repeated complaints of low back pain and a diagnosis of lumbago and sciatica. He further opined there is no record of any significant objective change during the course

of treatment, nor any change in the physical findings on examination.

Whayne also submitted the January 5, 2013 medical report of Dr. Travis which reflects he reviewed medical records pre-dating the December 21, 2009 opinion. The report reflects he reviewed records subsequent to the 2009 opinion including those from Dr. Chaney dated January 11, 2010 through March 27, 2012; PT Pros from May 7, 2010 through December 15, 2010; Dr. Hoskins' May 14, 2012 report and June 22, 2012 affidavit; Dr. Jenkinson's September 14, 2012 report and November 8, 2012 addendum; and the motion to reopen. Dr. Travis opined there was no objective evidence indicating Howard has suffered a worsening of his condition and/or impairment since the December 21, 2009 opinion. Likewise, Dr. Travis stated since the 2009 opinion, there have been no objective findings recorded on any examinations which would substantiate Howard's subjective complaints of worsening or indicating his impairment rating has changed. Dr. Travis stated as follows:

> It is clear from reviewing the medical records that the [ALJ's] criteria on 12/21/09 that there are absolutely no objective findings listed by any examiner that would substantiate this subjective complaint of worsening or that would warrant an increase in impairment rating since the [ALJ's]

> 12/21/09 ruling of DRE Category II for 5%.

Dr. Travis assessed a 5% impairment rating for Howard's current lumbar spine condition and found no further medical treatment necessary other than a home exercise program and regular walking.[1]

In the March 11, 2013 opinion and order, the ALJ denied Howard's motion to reopen, stating as follows:

> In this instance, the ALJ is more persuaded by Drs. Jenkinson and Travis that Howard's condition has not worsened since the prior Award. The ALJ has carefully reviewed all of the prior testimony and medical opinions. Howard's current subjective complaints as well as his self-described physical limitations are essentially identical to his complaints at the time of the 2009 opinion. There are no diagnostics to support an objective change in Howard's condition and the ALJ is not convinced by Dr. Hoskins' physical examination findings that Howard's condition has actually worsened. While Dr. Hoskins' believes that Howard has an 8% rating for his back, after reviewing all the evidence, the ALJ believes that Dr. Hoskins based his rating on basically the physical evidence that existed at the time of the prior Award.
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> While Dr. Hoskins may disagree with the impairment rating adopted by the prior ALJ, this is not sufficient to support a determination that the

[1] The following was designated as evidence from the original record: Howard's December 18, 2008 deposition, the October 23, 2009 hearing transcript, the December 21, 2009 opinion by ALJ Wolff, the July 23, 2010 Board opinion and the medical report of Hazard ARH.

> claimant's condition has actually worsened.
>
> The ALJ is cognizant that a claimant does not have to produce evidence of an increased impairment rating to be entitled to an award of permanent disability benefits on reopening. Again, however, the ALJ is not persuaded that Howard has put forth evidence that is[sic] his current situation is different than it was when the claim was before the prior ALJ. At that time, he asserted that he was severely limited in his ability to do household tasks such as mowing and that he did not believe that he was capable of returning to any sustained employment.
>
> On the balance, the ALJ finds that Howard has not presented persuasive evidence to justify an increased PPD award or a determination that he is now totally occupationally disabled on reopening.

Howard filed a petition for reconsideration asserting the same arguments he now makes on appeal which was denied by order dated April 30, 2013.

On appeal, Howard argues the opinions of Drs. Jenkinson and Travis cannot be considered substantial evidence. He asserts Dr. Jenkinson's opinion cannot be considered since he concluded Howard never had any objective abnormality or evidence of injury despite the fact that he assigned an impairment rating during the initial claim and ALJ Wolff determined Howard sustained work-related injuries

requiring objective medical findings. Howard argues Dr. Travis' opinion cannot be considered substantial evidence since he believed Howard had received no medical treatment subsequent to the December 2009 opinion, and was not provided post-award medical records. Howard also argues the ALJ erred in relying on the fact Howard believed he was incapable of returning to any employment during his initial claim since ALJ Wolff determined he was not permanently totally disabled, and the issue was therefore *res judicata*. Finally, Howard argues the ALJ misconstrued Dr. Hoskins' report as being based upon the physical evidence which existed at the time of the initial award. Dr. Hoskins' report reflects he reviewed post-award medical records and performed a physical examination upon which he rendered his opinions.

The burden of proof in a motion to reopen based on a change of disability falls on the party seeking to increase the award. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). Since Howard had the burden of proof and was unsuccessful before the ALJ, the sole issue is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). 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.

KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the

findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Pursuant to KRS 342.125(1)(d), in a motion to reopen alleging a change in disability, the worsening must be shown by "objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." In Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 218 (Ky. 2007), the Court discussed in detail what is required in proving a change in disability:

> KRS 342.125(1)(d) requires a change of disability to be shown by "objective medical evidence of a worsening ... of impairment." The statute does not refer to the *Guides,* to permanent impairment rating, or to permanent disability rating. We conclude, therefore, that although a greater permanent impairment rating is objective medical evidence of a worsening of impairment, it is not the only evidence by which the statute permits a worsening of impairment to be

> shown. Chapter 342 does not define the term "objective medical evidence;" however, KRS 342.0011(33) does define "objective medical findings" as being "information gained through direct observation and testing of the patient applying objective or standardized methods." *See Staples, Inc. v. Konvelski,* 56 S.W.3d 412 (Ky.2001); *Gibbs v. Premier Scale Company/Indiana Scale Company,* 50 S.W.3d 754 (Ky.2001). Mindful that KRS 342.0011(1) requires a harmful change in the human organism to be evidenced by objective medical findings in order to be compensable, we are convinced that KRS 342.125(1)(d) and KRS 342.730(1) require no less at reopening. If such findings demonstrate that an injured worker suffers a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury, they demonstrate a worsening of impairment. A worsening of impairment may or may not warrant increasing the worker's permanent impairment rating under the *Guides.*

The Supreme Court also noted an increased impairment rating is required when alleging an increase in permanent partial disability, but is not a requirement when alleging permanent total disability. Id.

In the case *sub judice*, the ALJ applied the appropriate legal standard, and we cannot say the evidence in the record compels a contrary result. The ALJ was presented with the opinions of Drs. Hoskins, Jenkinson and Travis, and found the latter two most persuasive. Dr.

Jenkinson evaluated Howard both during the original litigation and on reopening. In his September 14, 2012 opinion, Dr. Jenkinson concluded there was no evidence of significant change in Howard's impairment since the 2009 opinion, and emphasized he has continued to complain of back pain in the absence of objective abnormality. Likewise, Dr. Travis, in his January 5, 2013 report, concluded the medical records revealed no objective findings which would substantiate Howard's subjective complaint of worsening or would warrant an increase in impairment rating since the 2009 decision. The ALJ also compared Howard's testimony from the initial claim to his testimony upon reopening, and found his subjective complaints and physical limitations have essentially remained the same. The opinions of Drs. Jenkinson and Travis, as well as Howard's testimony relied upon by the ALJ constitute substantial evidence in the record, and no contrary result is compelled.

Howard's arguments essentially attempt to have this Board re-weigh the evidence, and substitute its opinion for that of the ALJ which we cannot do. Whittaker v. Rowland, supra. It was the ALJ's prerogative to rely upon Dr. Jenkinson's and Dr. Travis' opinions. Howard merely points to conflicting evidence supporting a more

favorable outcome, which is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., supra.

Howard argues Dr. Travis' opinion cannot be considered since he believed no medical treatment had been rendered subsequent to the December 2009 opinion, and he was not provided post-award medical records. A review of Dr. Travis' January 5, 2013 report reveals forty pages summarizing in chronological order the medical records he reviewed. Subsequent to the 2009 opinion, Dr. Travis summarized medical records from Dr. Chaney from 2010, 2011 and 2012; PT Pros in 2010; Dr. Hoskins' report and affidavit; Dr. Jenkinson's report and addendum; and the motion to reopen and attached documents. Therefore, in light of the foregoing, we find Howard's argument unpersuasive.

Accordingly, the opinion and order rendered March 11, 2013 by Hon. Allison Emerson Jones, Administrative Law Judge, and the order on reconsideration issued April 30, 2013 are hereby **AFFIRMED.**

ALL CONCUR.

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