Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 9, 2019

CLAIM NO. 201458536

ARMSTRONG COAL COMPANY, INC. PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH, ADMINISTRATIVE LAW JUDGE**

BRIAN PIPER and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Armstrong Coal Company ("Armstrong") appeals from the April 3, 2019 Amended Opinion, Order and Award, and the April 25, 2019 Order on petition for reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge ("ALJ"). The ALJ awarded Brian Piper ("Piper") temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits for a work-related low back injury sustained on May 1, 2014. The

ALJ found Armstrong failed to prove Piper's prior low back condition was impairment ratable prior to May 1, 2014, and therefore declined to attribute any apportion of the 20% impairment rating to a pre-existing, active condition pursuant to Finley v. DBM Technology, 217 S.W.3d 261 (Ky. App. 2007).

On appeal, Armstrong argues the ALJ erred by reversing her prior finding in the November 27, 2017 Opinion, Order and Award that Piper has a pre-existing, active low back condition. Armstrong also argues the ALJ erred by omitting from the amended opinion two findings of fact contained within the original opinion. Because the ALJ followed the directives of the Court of Appeals, acted within her discretion, and the evidence does not compel a contrary result, we affirm.

Piper filed a Form 101 alleging he injured his low back on May 1, 2014 while working for Armstrong as a roof bolter, when a cable hit him in the head knocking him approximately ten feet to the mine floor. Piper continued to work for Armstrong until October 27, 2014. An October 20, 2014 lumbar MRI demonstrated right lateral disc herniation at L2-3 extending into neural foramen and effacing the exiting L2 nerve root at this level corresponding with Piper's symptoms; and facet hypertrophy at multiple levels resulting in mild neural foraminal stenosis bilaterally at L4-5 and on the left at L3-4.

Dr. Benjamin Burkett ultimately performed a lumbar arthrodesis at L2-3 on April 9, 2015. Dr. Burkett listed a diagnosis of far lateral lumbar disc herniation at L2-3, right side. Dr. Burkett subsequently administered a lumbar steroid injection in November 2015 and provided a diagnosis of failed lumbar fusion.

Dr. Burkett placed Piper at maximum medical improvement on March 23, 2016 and assigned permanent restrictions.

Medical records demonstrate Piper previously treated for low back symptoms from July 2013 through April 2014. On July 10, 2013, Dr. Karim Rasheed diagnosed chronic low back and bilateral knee pain. Dr. Rasheed prescribed Lortab, Ultram, and Zanaflex, ordered a lumbar MRI, and scheduled a lumbar epidural injection. The July 16, 2013 MRI demonstrated disc extrusions at L2-3 and L4-5 producing neural foraminal stenosis and possible impingement of the left L4 nerve root. Piper received a lumbar steroid injection in August 2013 and December 2013, and facet injections at L3-S1 in January 2014. A radiofrequency neurolysis at L2-L5 was performed on April 3, 2014.

On March 16, 2015, Dr. Burkett diagnosed lumbar pain and a herniated disc, and recommended a lumbar fusion. He stated, "80% exacerbation of preexisting condition. Overall MRI findings are similar, it appears MRI findings from October 2014 and July 2013 are the same. The work injury has amplified and expedited the necessity of surgery." On July 7, 2016, Dr. Burkett diagnosed lumbar intervertebral disc displacement and degeneration, and pain. He assessed a 10-13% impairment rating based on a herniated disc diagnosis pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Burkett did not believe Piper met the criteria for assessing an impairment rating greater than 20% because he did not exhibit findings of significant low extremity impairment. Dr. Burkett acknowledged Piper could

qualify for a 20-23% impairment rating due to the fusion surgery, and deferred issues of disability ratings to a specialist.

Piper filed the October 10, 2016 report of Dr. James Butler. Pursuant to the AMA Guides, Dr. Butler determined Piper met the criteria for DRE lumbar Category IV, 20-23% impairment rating due to his lumbar surgery. Dr. Butler explained Piper did not qualify for a Category V. Therefore, he assessed a 20% impairment rating, especially when considering Piper's excellent strength and range of motion in his back. Dr. Butler did not attribute any of the impairment to a pre-existing, active condition.

Armstrong filed Dr. Michael Best's May 17, 2017 report. He determined the May 1, 2014 work injury was to the cervical spine, and found little, if any, injury to the lumbar spine. Dr. Best stated the L2-3 and L4-5 disc extrusions were pre-existing conditions noted by July 16, 2013 MRI. "It would, therefore, appear that this is a preexisting active medical condition at both L2-3 and L4-5." Dr. Best then requested the entirety of the prior 2013 treatment records to help determine the status of this pre-existing condition and whether there was a pre-existing, active medical condition requiring care and treatment at the time of the May 1, 2014 event. He stated a review of the 2013 treatment records would help determine if this is a work-related condition. Pursuant to the AMA Guides, Dr. Best assessed a 13% pre-injury impairment based upon the July 2013 MRI. Following the April 2015 surgery, Dr. Best assessed a 20% impairment rating. "Therefore, the current impairment rating of 20% minus the preexisting impairment rating of 13% indicates

the maximum impairment directly and casually related to the May 1, 2014 work event is a 7% ... ."

In the November 27, 2017 opinion, the ALJ determined Piper sustained a 20% whole person impairment with 80% due to the work injury on May 1, 2014. She noted both Drs. Butler and Best assessed a 20% impairment rating, but the medical evidence differed regarding the extent of any pre-existing condition.

The ALJ next determined, based upon the 2013 treatment records, that Piper had a pre-existing, active low back condition. The ALJ noted Dr. Burkett opined the work injury resulted in an 80% exacerbation of the pre-existing condition, and found his opinion regarding apportionment between the work injury and pre-existing injury most persuasive. Based upon Dr. Burkett's opinion, the ALJ found, "80% of Piper's 20% impairment is related to his work injury, which would be a 16% impairment as a result of the work injury." The ALJ questioned Dr. Best's opinion regarding apportionment for a pre-existing active impairment since he requested more information to make such determinations. Therefore, the ALJ found Piper sustained a 16% impairment due to the May 1, 2014 work injury.

The ALJ found that although Piper is not entitled to permanent total disability, he is entitled to the three multiplier. The ALJ awarded Piper TTD benefits, PPD benefits, and medical benefits.

Both parties filed petitions for reconsideration requesting the ALJ correct typographical errors. Piper did not challenge any aspect of the ALJ's finding of a pre-existing, active condition. Armstrong argued the ALJ erred in assessing a 16% impairment rating to the work injury, since none of the physicians of record

assigned this impairment rating. Armstrong argued three impairment ratings were assigned (10-13% by Dr. Burkett, 20% by Dr. Butler, and 7% by Dr. Best) and the ALJ is precluded from independently calculating or recalculating the rating of a physician to arrive at a new disability rating. Armstrong additionally argued Dr. Burkett did not calculate the pre-existing impairment in accordance with the AMA Guides. Armstrong argued Dr. Best's rating is the only rating in the record that properly apportions Piper's pre-existing active impairment in accordance with the AMA Guides.

Piper filed a response essentially arguing the ALJ was authorized to take 80% of the 20% impairment, to arrive at a 16% impairment rating due to the May 1, 2014 work injury. In the December 3, 2018 order, the ALJ corrected typographical errors contained within the opinion, but overruled Armstrong's petition relative to the impairment rating.

Armstrong appealed to this Board making the same argument it raised in its petition for reconsideration. It asserted the ALJ was required to pick from one of the three impairment ratings in the record and was compelled to adopt Dr. Best's impairment rating. The Board rendered an opinion on May 4, 2018, vacating in part and remanding. After summarizing the evidence and the ALJ's opinion, the Board stated as follows:

> In Dr. Burkett's March 16, 2015, medical record, he states, "80% exacerbation of preexisting condition." Not only does this language fail to specify if he is referring to a preexisting *active* condition, but it is too vague, as a matter of law, to serve as the basis for the ALJ to calculate her own impairment rating even if he *had* specified pre-existing *active* condition. As it stands, however, Dr. Burkett offered no opinion that the

> impairment rating stemming from the May 1, 2014, injury was 80% of a pre-existing *active* impairment rating, and this is confirmed by the fact that he assessed a 10-13% impairment rating without attributing any of it to a pre-existing active condition.
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> Significantly, we note that, in the November 27, 2017, Opinion, Award, and Order, the ALJ arrived at her 16% impairment rating by merely calculating 80% of 20%. However, this calculation of impairment is not only incompatible with the 5th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, but, as much as we can glean from Dr. Burkett's ambiguous language, this calculation does not represent an "80% exacerbation of [a] pre-existing condition." Therefore, it is abundantly clear that even the ALJ did not fully understand the meaning behind Dr. Burkett's ambiguous language.
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> Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people, and Dr. Burkett's opinion regarding an "80% exacerbation of preexisting condition" falls short of this standard. *See* Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). On remand, the ALJ shall not rely on Dr. Burkett's vague language in determining an impairment rating for the May 1, 2014, injury and shall, instead, rely upon one of the three impairment ratings in the record.
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> Accordingly, the award of PPD as granted in the November 27, 2017, Opinion, Award, and Order and affirmed in the November 27, 2017, Order is **VACATED.** This claim is **REMANDED** to the ALJ for additional findings and a determination of the appropriate impairment rating attributable to the work injury and an award of income benefits.

Piper appealed, and the Court of Appeals affirmed the Board in an unpublished opinion rendered December 21, 2018. The Court of Appeals stated in relevant part as follows:

We agree with the Board that the ALJ erred in relying on Dr. Burkett's statement "80% exacerbation of preexisting condition" to calculate the final impairment rating because there is no evidence Dr. Burkett calculated this percentage in accordance with the AMA Guides as required by statute and by our case law.

"Permanent impairment rating" is defined as the "percentage of whole body impairment caused by the injury or occupational disease as determined by the 'Guides to the Evaluation of Permanent Impairment.'" KRS 342.0011(35). "The proper interpretation of the *Guides* and the proper assessment of impairment are medical questions." *Lanter v. Kentucky State Police*, 171 S.W.3d 45, 42 (Ky. 2005). "A claimant found to have a compensable, permanent partial disability receives workers' compensation benefits based on the percentage of the employee's disability assessed by the ALJ in accordance with the AMA Guides." *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006)(citing KRS 342.730(1)' KRS 342.0011(35)).

Therefore, although it is within an ALJ's discretion to "believe or disbelieve various parts of the evidence," Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000), "an ALJ cannot choose to give credence to an opinion of a physician assigning an impairment rating that is not based upon the AMA Guides. In other words, a physician's latitude in the field of workers' compensation litigation extends only to the assessment of a disability rating percentage within that called for under appropriate section of the AMA Guides." *Jones*, 189 S.W.3d at 153.

There is no evidence that Dr. Burkett consulted the Guides or had the Guides in mind when he stated "80% exacerbation of a pre-existing condition." Dr. Burkett made no mention of a preexisting condition in his letter of July 7, 2016, in which he assigned a total impairment of 10-13%. Thus, the Board correctly held that the ALJ erred as a matter of law in relying on Dr. Burkett's statement because it did not conform to the statutory requirements and therefore did not constitute adequate evidence to support the impairment finding.

As to Armstrong's contention that the ALJ may rely on Dr. Best's 7% raring because he is the only physician to address the preexisting active condition, we note the ALJ's reservation about the reliability of Dr. Best's opinion. The ALJ stated as follows:

> Although Dr. Best assigns 7% of the total 20% to the work-related injury, his opinion on whether the condition is due to pre-existing active condition or the work related condition is not definite. Dr. Best says the disc extrusions at L2/3 and L4/5 are preexisting conditions; however, he specifically states the entire 2013 treatment records would help definitively determine the status of the pre-existing condition and determine whether there was a pre-existing active medical condition. He further states that whether this is a work related condition depends on the findings from the 2013 treatment. It is puzzling how Dr. Best can make any apportionment to the work injury or pre-existing when he clearly implies he needs more information to make such determinations.

"[T]he burden of proving the existence of a pre-existing condition falls upon the employer." *Finley v. DBM Techs.*, 217 S.W.3d 261, 265 (Ky. App. 2007(citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984)). It is possible when considering the evidence on remand that the ALJ may find Armstrong did not meet its burden of proving a preexisting active condition, which must "be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury." *Id.* The ALJ previously found the preexisting condition to be symptomatic but may conclude the employer failed to prove that it was impairment ratable.

For the foregoing reasons, the opinion of the Board vacating in part and remanded for additional findings is affirmed.

In the April 3, 2019 amended opinion, the ALJ stated as follows regarding exclusion for pre-existing disability:

> After careful review of all the evidence, the ALJ finds that Piper sustained a 20% whole person impairment due to the work injury on May 1, 2014. Piper sustained a serious work injury, when a mining cable struck him in the head and knocked him to the ground. The medical records establish that Piper had pre-existing lumbar condition, exacerbated by the work injury. Dr. Butler and Dr. Best both agree that Piper has a total whole person impairment of 20% based on the herniation and resulting surgery. The medical evidence differs with regard to the extent of any pre-existing "active" condition.
>
> 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. The burden of proving the existence of a pre-existing condition falls upon the employer. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (KY APP 1984). Impairment rating is a medical question. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (KY 2003). A pre-existing condition that is both asymptomatic and produces no impairment prior to the work related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury any impairment or medical expense related solely to the pre-existing condition is compensable. *Finley v. DBM Technology*, 217 S.W.3d 261 (KY APP 2007).
>
> The ALJ finds Armstrong failed to satisfy it[sic] burden of proving Piper had an active pre-existing condition. Although the treatment records document a pre-existing symptomatic low back condition, Armstrong has failed to persuade the ALJ that Piper's pre-existing condition was impairment ratable prior to the May 1, 2014 injury.
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> The records of Dr. Rasheed and Dr. Nguyen document in 2013 Piper had complaints of low back pain radiating into the hip and leg. This pain resulted in treatment including pain medications, multiple injections, and a

radiofrequency procedure. The 2013 injury revealed the disc extrusions at L2/3 and L4/5 with possible impingement at the L4 nerve root. However, during this period of treatment, Piper continued to work as a roof bolter, while receiving active treatment. Piper's work as a roof bolter was strenuous work, requiring him to perform heavy lifting, bending, twisting, turning, squatting, crawling, and pulling.

The treating physician Dr. Burkett acknowledged and addressed the pre-existing condition. He opined the work injury resulted in an 80% exacerbation of the pre-existing condition. He opined the work injury amplified and necessitate the need for surgery. Dr. Burkett did not assign an impairment for the pre-existing condition.

Armstrong relies on the pre-existing impairment and opinion of Dr. Best to establish Piper had an active pre-existing condition. The ALJ finds Dr. Best's impairment and opinion regarding the pre-existing condition less than credible. Dr. Best assigns 13% of his total 20% impairment to the pre-existing condition, but his opinion on whether the condition is due to a pre-existing active condition or the work related condition is not definite. Dr. Best says the disc extrusions at L2/3 and L4/5 are pre-existing conditions. Although he assigns an impairment rating for the pre-existing condition, he specifically states the entire 2013 treatment records would help definitively determine the *status of the pre-existing condition* and determine *whether there was a pre-existing active medical condition*. He further states that whether this is a work-related condition depends on the findings from the 2013 treatment. It is puzzling how Dr. Best makes any apportionment to the work injury or pre-existing condition when he clearly indicates he needs more information to make such determinations.

Although Piper had a pre-existing low back condition, Armstrong failed to satisfy its burden of proving Piper had an active pre-existing condition because it failed to prove the condition was impairment ratable prior to May 1, 2014. Based on the foregoing, the ALJ finds Piper has sustained 20% impairment because of his work-related injury on May 1, 2014.

The ALJ awarded PPD benefits based upon the 20% impairment rating and increased by the three multiplier. The ALJ also awarded TTD benefits and medical benefits.

Piper filed a petition for reconsideration requesting the ALJ to correct a typographical error. Armstrong filed a petition for reconsideration essentially raising the same arguments it now raises on appeal. It also argued the ALJ misunderstood or mischaracterized Dr. Best's report and requested the ALJ correct typographical/clerical errors. The ALJ sustained Piper's petition. The ALJ sustained Armstrong's petition requesting correction of errors. However, the ALJ overruled the remainder of Armstrong's petition, stating as follows:

> . . . . The Board and the Court of Appeals ordered that the ALJ could not rely on the opinion of Dr. Burkett with regards to pre-existing impairment. As discussed in the November 27, 2017 Opinion and again in the Opinion on Remand, the ALJ is not persuaded by the opinion of Dr. Best regarding pre-existing impairment. The ALJ explained her reservations about the reliability of Dr. Best's opinion. Further, the Court of Appeals noted the ALJ's reservations regarding Dr. Best's opinion and specifically advised the ALJ may on Remand, find that Armstrong did not meet its burden of proving the pre-existing active condition was impairment ratable. As fact finder, the ALJ has the authority to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (KY 1993). The ALJ had the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (KY 1977). The ALJ found the opinion of Dr. Best regarding pre-existing impairment not credible and that Armstrong failed to prove the pre-existing condition was impairment ratable.

On appeal, Armstrong argues the ALJ erred by reversing her prior finding of fact that Piper suffered from a pre-existing, active condition prior to the May 1, 2014 work injury in the November 27, 2017 opinion. Therefore, the ALJ concluded Armstrong had proven the pre-existing condition was symptomatic and impairment ratable prior to May 1, 2014 pursuant to Finley v. DBM Technology, supra, in the original opinion.

Armstrong points out Piper did not challenge this finding it his petition for reconsideration or in an appeal to the Court of Appeals. Armstrong also notes it only challenged the 16% impairment rating assessed by the ALJ. It asserts whether it failed to meet its burden of proving Piper suffered from a pre-existing, active low back condition was not a preserved issue on appeal before the Board or the Court of Appeals. It also argues the ALJ erred in reversing the finding Piper suffered from a pre-existing, active low back condition because it violates the law of the case doctrine and was prohibited pursuant to Bowerman v. Black Equipment Co., 297 S.W.3d 898 (Ky. App. 2009).

Armstrong also argues the ALJ erred by omitting from its Amended Opinion its prior factual findings that Piper "was taking pain medication and muscle relaxers at the time of his May 1, 2014 work injury" and that Piper's "first treatment following the work injury was a previously scheduled pain management appointment." Armstrong argues the deletion of these findings support the fact Piper had a prior active lumbar impairment and constitutes a clear error.

We initially note the Kentucky Court of Appeals affirmed the decision of the Board. This Board vacated the award of PPD benefits and remanded for

additional findings. When a decision is vacated, it is as if the initial determination never existed. This was addressed in Hampton v. Flav-O-Rich, 489 S.W.3d 230 (Ky. 2016), and in Commonwealth of Kentucky v. Werner, 2014-CA-001154-WC, 2015 WL 2226274 (Ky. Ct. App., April 10, 2015)(designated Not to be Published). The holding in both cases establishes that when an ALJ's decision is vacated, it is effectively canceled, annulled, or revoked. Thereafter, the judgement or opinion is no longer binding or conclusive.

As noted in Hampton, 489 S.W.3d at 234-235, the Kentucky Supreme Court stated as follows:

> Because the Board vacated the ALJ's award, he is required to write a new opinion on remand; he cannot, as the Court of Appeals indicated, simply supplement his existing opinion with additional findings of fact. In the process of writing that new opinion, there is nothing to prevent the ALJ from entering a different award, nor is there anything to compel the ALJ to enter the same award. By vacating the ALJ's opinion and requiring him to make additional findings, the Board has implicitly authorized him to enter a different award . . .

In Werner, the ALJ had originally determined the Claimant was not entitled to workers' compensation benefits. This Board vacated and remanded, directing the ALJ on remand to review the evidence and determine whether the Claimant sustained a work-related knee injury with appropriate findings of fact. In the opinion on remand, the ALJ entered an award in favor of the Claimant and contrary to what was previously found. On appeal, the UEF argued the ALJ had no authority to enter an award in favor of the Claimant since the ALJ had already determined that he was not in fact entitled to an award of benefits and cited to Bowerman v. Black Equipment Co., supra. The Court of Appeals stated as follows:

> This argument misses the mark, however, because the ALJ did not reverse himself. Rather, the Board vacated the ALJ's decision and directed the ALJ to reconsider this matter pursuant to its authority under KRS 342.285(3). When any court or tribunal orders that a judgment, opinion, or order be set aside or vacated, that decision effectively cancels, annuls, or revokes the judgment, order, or opinion. *See* BLACK'S LAW DICTIONARY 1546 (7th ed. 1999)(defining "vacate" as "to nullify or cancel; make void; invalidate"). Thereafter, the judgment, order or opinion is no longer binding or conclusive. *First State Bank v. Asher*, 273 Ky. 54, 117 S.W.2d 581, 583 (1938). This means the vacated judgment no longer binds any litigant and, by logical extension, no longer binds the ALJ who rendered the vacated judgment. Thus, upon remand, the ALJ was free to consider the evidence, and in doing so, reevaluate the merits of Werner's claims. *See, e.g.*, *ABS Global, Inc. v. Draper*, No. 2013-SC-000051-WC, 2014 WL1514991 (Ky. April 17, 2014)(holding, in a situation where the Board's order vacated the ALJ's original opinion and order, "It is clear that the Board wanted the ALJ to fully review the evidence and either make findings to support his original opinion or reach a different conclusion on remand.)

We find this reasoning is directly applicable to the case before us. We additionally note that BLACK'S LAW DICTIONARY (10th ed. 2014), defines a reversal as, "An annulling or setting aside: esp., an appellate court's overturning of lower court's decision." This was also implied by the Court of Appeals in its December 21, 2018 opinion affirming the Board, when it noted,

> It is possible when considering the evidence on remand that the ALJ may find Armstrong did not meet its burden of proving a preexisting active condition, which must "be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury." *Id.* The ALJ previously found the preexisting condition to be symptomatic but may conclude the employer failed to prove that it was impairment ratable.

> For the foregoing reasons, the opinion of the Board vacating in part and remanded for additional findings is affirmed.

This Board's opinion vacating in part and remanding for additional findings was affirmed by the Kentucky Court of Appeals, thereby "annulling or setting aside" the ALJ's decision. The Court found the Board correctly held the ALJ erred as a matter of law in relying on Dr. Burkett's statement and did not constitute adequate evidence to support the impairment finding. The Court declined to direct the ALJ to rely upon Dr. Best's 7% pre-existing impairment rating. Rather, the Court noted the ALJ's reservations concerning Dr. Best's opinion and that the ALJ, on remand, could possibly find when considering the evidence that Armstrong did not meet its burden of proving a pre-existing active condition, which must "be symptomatic *and* impairment ratable" pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury. Therefore, the ALJ was required to render a decision based upon Finley v. DBM Technology, supra, without relying upon Dr. Burkett's statement. Since the ALJ's award of PPD benefits was vacated, the ALJ was not bound by her previous determinations.

That said, we note that, as fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than that 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

As noted by the Court, a pre-existing condition is deemed active, and therefore not compensable, if it is "symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." Moreover, as an affirmative defense, the burden to prove the existence of a pre-existing active condition falls on the employer. Finley v. DBM Technologies, 217 S.W.3d at 265. Since Armstrong was unsuccessful in its burden, the question on appeal is whether the evidence compels a different result. 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under

the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, supra.

It appears undisputed that Piper's low back condition warrants a 20% impairment rating and he suffered from a symptomatic low back condition prior to the May 1, 2014 work injury. The issue is whether Piper's pre-existing condition was impairment ratable pursuant to the AMA Guides immediately prior to the work injury. On remand, the ALJ acted within the discretion afforded to her, and issued a new decision. As noted above, the ALJ could not rely upon Dr. Burkett's statement, "80% exacerbation of preexisting condition" in assessing Piper's pre-existing impairment. The ALJ explained why she found Dr. Best's opinion regarding this issue questionable and ultimately unpersuasive. Therefore, although Piper had a pre-existing low back condition, the ALJ found Armstrong failed to satisfy its burden of proving Piper had an active pre-existing condition because it failed to prove the condition was impairment ratable prior to May 1, 2014. The ALJ performed the appropriate analysis, and rendered a decision based upon the evidence, and a contrary result is not compelled. The ALJ did not act outside the discretion afforded to her. We find no error in this exercise of discretion, and the ALJ's decision is affirmed.

We likewise find the alleged error by the ALJ in omitting the two previous findings of fact from the Opinion on remand is meritless, and at most harmless, since they do not address whether Piper's pre-existing condition was impairment ratable prior to May 1, 2014.

Accordingly, the April 3, 2019 Amended Opinion, Order and Award, and the April 25, 2019 Order on petition for reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge, is **AFFIRMED.**

ALL CONCUR.

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