

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: August 20, 2021

CLAIM NO. 202001408 & 201965427

CALVARY ENTERPRISES, LLC/TCB DEV

PETITIONER

VS.

APPEAL FROM HON. W. GREG HARVEY,  
ADMINISTRATIVE LAW JUDGE

MICHAEL CLEVINGER and  
HON. W. GREG HARVEY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**BORDERS, Member.** Calvary Enterprises, LLC/TCB DEV (“Calvary”) appeals from the May 17, 2021 Opinion, Award and Order and the June 16, 2021 Order on Petition for Reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ determined Michael Clevinger (“Clevinger”) sustained a work-related low back injury and awarded him temporary total disability (“TTD”)

benefits, permanent partial disability (“PPD”) benefits based on a 10% impairment rating, and medical benefits. The ALJ further determined Clevinger suffered from simple coal workers’ pneumoconiosis (“CWP”), category 1/1 without evidence of pulmonary impairment, entitling Clevinger to an award of Retraining Incentive Benefits. On appeal, Calvary argues Dr. Abdu Nadar’s medical report does not constitute substantial evidence, and the ALJ erred in not considering the recent, applicable, and controlling cases of Wetherby v. Amazon, 580 S.W.3d 521 (Ky. 2019), and Viwin Tech Windows and Doors, Inc v. Ivey, 632 S.W.3d 153 (Ky. 2021). For reasons set forth herein, we affirm.

Clevinger testified by deposition on January 15, 2021 and at the hearing held March 19, 2021. Clevinger is 58 years old and has a high school education and six months of vocational training at Mayo Vocational School. He has mining papers and he has worked as an EMT. His work history is primarily in the mining industry where he has worked underground as a laborer and a foreman. He was self-employed as a carpenter from 2003 to 2005.

Clevinger previously injured his back and shoulders in a rock fall in 1985. He was involved in a 2017 incident when a conveyor chain he was installing broke, jarred him, and caused immediate low back pain. After the incident, he saw his family doctor and then went to a chiropractor. He recovered and was able to resume full duty work. He had an MRI after the 2017 incident, but surgery was not recommended, and he was not placed on work restrictions.

On August 30, 2019, Clevinger was working as a foreman moving a belt structure. He estimated he was lifting between 125 and 150 pounds when he felt

back pain. He finished his shift and later saw Dr. Mark Reed, his primary care physician, who performed X-rays and ordered an MRI. He was referred to Dr. Matthew Tutt, a neurosurgeon. Clevinger had back pain and radicular symptoms into both legs. He was taken off work by Dr. Reed and by Dr. Tutt. Dr. Tutt suggested injections and physical therapy, but Clevinger did not improve. Back surgery was recommended but was denied by the carrier. Clevinger continues to have pain in his back and down his legs. He stated the symptoms following the 2019 incident differed from those he experienced in 2017. Clevinger now has burning pain in his legs after walking much distance. He does not feel he can return to work as a coal miner in his present condition.

Dr. Reed saw Clevinger on September 3, 2019. Clevinger complained of back pain after lifting a belt structure. An X-ray revealed degenerative disc and joint disease with dextroscoliosis. Dr. Reed ordered an MRI that showed degenerative changes in the lumbosacral spine with disc bulges at L4-5 and L5-S1. Dr. Reed took Clevinger off work and eventually referred him to Dr. Tutt. Dr. Reed previously saw Clevinger in May 2017 for low back pain with numbness and tingling in the left leg. Clevinger was diagnosed with multi-level degenerative disc disease. Dr. Reed prescribed Neurontin and referred Clevinger for chiropractic treatment.

Dr. Tutt treated Clevinger on November 14, 2019. Clevinger complained of low back and bilateral leg pain after a work-related lifting injury on August 30, 2019. Pain was reported with tingling and weakness in both legs. Dr. Tutt diagnosed Clevinger with stenosis and herniated discs at L3-4 and L4-5. He opined the L4-5 disc was worse than L3-4. Dr. Tutt prescribed medication and a six-

week course of physical therapy and placed Clevinger off work through January 2, 2020. Clevinger returned to Dr. Tutt on January 2, 2020. Physical therapy provided only minimum relief. After reviewing the 2019 MRI, Dr. Tutt reiterated Clevinger has herniated discs at L3-4 and L4-5 with resulting canal stenosis and L4-5 retrolisthesis. Dr. Tutt suggested Clevinger would be a good candidate for L3-5 laminectomy and possible L3-4 and L4-5 discectomy.

Dr. Nadar performed an independent medical evaluation (“IME”) on September 29, 2020. Dr. Nadar diagnosed a lumbosacral strain with radiculopathy, disc protrusion L4-5 and L5-S1 with moderate canal stenosis, and neural foraminal narrowing. Dr. Nadar stated Clevinger has limitations in lifting, pushing, pulling, frequent bending, twisting, and prolonged sitting/standing. Dr. Nadar assigned a 10% impairment rating pursuant to the 5<sup>th</sup> Edition for the American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”). Dr. Nadar stated although Clevinger had a prior 2017 injury, he missed no work and his symptoms resolved after a month of chiropractic treatment. Dr. Nadar noted Clevinger continues to have persistent radicular symptoms, which have not responded to conservative treatment to date. His impairment is attributable solely to the work injury. Dr. Nadar felt Clevinger may benefit from surgical intervention with a lumbar laminectomy and possible discectomy. If Clevinger decides against surgery, he will continue to need ongoing symptomatic treatment in the form of medication and injections. Dr. Nadar stated Clevinger did not have an active impairment prior to this injury. He does not retain the physical capacity to return to

the type of work he was performing at the time of the injury because of persistent low back pain with radicular symptoms.

In a March 31, 2021 supplemental report, Dr. Nadar indicated he reviewed the April 28, 2017 and September 11, 2019 MRIs and Dr. Thomas Menke's reports. Dr. Nadar acknowledged that the MRI findings "are pretty much the same" and showed disc bulge/protrusion with moderate canal stenosis and bilateral foraminal narrowing. Flexion/extension views of the lumbar spine dated January 2, 2020 revealed mild retrolisthesis of L4 over L5 revealing some instability. Dr. Nadar opined most of the current disability is causally related to the August 30, 2019 injury.

Dr. Menke performed an IME on February 17, 2020. Dr. Menke diagnosed a lumbar strain after a lifting injury on August 30, 2019. Dr. Menke noted the symptoms have evolved into low back pain and greater left leg symptoms. Dr. Menke stated the lumbar strain aggravated the underlying degenerative changes seen in the post-injury lumbar MRI. He noted the post-injury MRI does not show any evidence of an acute or subacute injury. All of the findings on the post-injury MRI are degenerative in nature. Dr. Menke stated the post-injury MRI is not significantly different from the April 28, 2017 lumbar MRI. There is no evidence of a structural change in condition. Dr. Menke did not feel Clevinger had reached maximum medical improvement ("MMI"). Dr. Menke stated it would be appropriate to proceed with one or two lumbar epidural steroid injections to try to break the cycle of swelling and inflammation to return him to his pre-injury state. He estimated Clevinger would reach MMI two weeks after the injections. Dr. Menke stated the degenerative changes and stenosis pre-existed the work incident. Dr. Menke stated

the work incident produced only a temporary exacerbation/aggravation of the underlying degenerative changes, and any impairment rating is related to longstanding degenerative changes in the lumbar spine, and not the work injury. Based upon the AMA Guides, he would not assign an impairment rating above 0% for the lumbar spine related to the work injury. Dr. Menke stated Clevinger had a 10% pre-existing active condition of degenerative stenosis and arthritis ratable pursuant to the AMA Guides.

In a March 15, 2021 supplemental report, Dr. Menke indicated he reviewed additional treatment records and Dr. Nadar's report. Dr. Menke stated Clevinger reached MMI as of May 12, 2020 after receiving epidural steroid injections. Dr. Menke reaffirmed his IME findings. Dr. Menke stated Clevinger requires no permanent restrictions related to the work injury.

Calvary filed records from Hackney & Hensley Chiropractic Center documenting treatment from May 15, 2017 through August 16, 2017. Clevinger complained of low back and leg pain. The diagnosis was multi-level bulging discs in the lumbar spine with radiculopathy and muscle spasms. The treatment notes indicate Clevinger continued to complain of pain throughout the 10 visits over the 3-month period.

Calvary filed records from the Pikeville Medical Center. The April 19, 2017 X-rays of the lumbar spine showed disc space narrowing at L4-L5 and L5-S1. Clevinger had mild spurring anteriorly and laterally throughout the lumbar region. No fracture or subluxation was seen. The April 28, 2017 MRI of the lumbar spine revealed mild chronic compression abnormalities involving the superior endplates of

the vertebral bodies at T12 and L5 and multi-level degenerative changes involving the lumbar spine.

The ALJ made the following findings of facts and conclusions of law relative to the issues now on appeal, which are set forth *verbatim*:

**Injury/Work-related    Injury/Causation/Pre-existing  
active**

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(1).

Pursuant to Haycraft v. Cohart Refractories, 544 S.W.2d 222 (Ky. 1976) a worker may prove an injury resulting from cumulative trauma by showing the nature and duration of the work performed probably aggravated a condition to the degree that it resulted in active physical impairment sooner than would be expected if the work had been less strenuous.

Here, the medical evidence is in agreement that an injury, of some type, occurred on August 30, 2019. Dr. Menke opined Clevinger sustained only a temporary aggravation/exacerbation of his underlying degenerative changes and disc bulging and stenosis in the spine. He further opined Clevinger had a pre-existing active impairment from a 2017 work incident that would have existed prior to the 2019 incident and been impairment ratable at 10% to the body as a whole. He did not feel the 2019 incident caused any structural change to the spine based on his comparison of the 2017 and 2019 lumbar MRIs.

Dr. Nadar opined otherwise. He acknowledged the MRIs were "pretty much the same". However, he opined the 2017 injury had resolved as Clevinger was no longer receiving any treatment for it and had returned to work at his regular duty. Dr. Nadar did not deem Clevinger to have any preexisting and active impairment

prior to the August 30, 2019 lifting incident and opined that all 10% of his impairment to the lumbar spine was caused by the 2019 incident. He noted that the 2020 flexion/extension views on January 2, 2020 showed retrolisthesis of L4 over L5 and showed instability of the spine at that level.

Clevinger testified that during the 2019 incident he and some coworkers were picking up some of a conveyor belt section when he hurt his low back. He estimated the weight he was lifting was from 125 to 125 pounds. Pain hit his back and down his left leg of a character he had not previously experienced. He eventually was sent to Dr. Tutt who recommended surgery but that procedure was denied by the carrier.

Clevinger was asked about the 2017 incident and he acknowledged he had a back injury that year. He even had an MRI and treated with a chiropractor. There was no lost time because of that incident and the chiropractic treatment resolved his pain. He then had a left rotator cuff injury and surgery in 2018 and he returned to full duty after that injury as well.

Defense counsel first argues Clevinger had a pre-existing active disability as a result of the 2017 lifting incident. Dr. Menke opined Clevinger was impairment ratable and symptomatic prior to the August 30, 2019 lifting incident. Pursuant to the holding in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007) a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a preexisting dormant condition. Id. at 265; *see also* McNutt Constr./First Gen. Servs. v. Scott, 40 S.W.3d 854, 858-59 (Ky. 2001). The Defendant argues symptoms persisted after the 2017 incident and the strain injury suffered in 2019 was just a temporary injury.

The ALJ has reviewed the evidence. Clevinger did attend 10 chiropractor visits after the 2017 incident. He also had an MRI. He last had treatment for the back by the chiropractor on August 16, 2017. There is nothing to suggest that the incident caused him to miss work or limited his ability to return to the same job he was doing. In fact, at the time he had the August 30, 2019

injury, Clevinger was lifting significant weight. For these reasons the ALJ does not find Clevinger had a pre-existing and active disability or impairment at the time of the 2019 incident.

The next question is whether or not the 2019 incident constituted an injury of a permanent nature or meets the definition of injury by virtue of aggravating an otherwise dormant condition. Both Dr. Nadar and Dr. Menke did not see a significant difference between the 2017 and 2019 lumbar MRIs.

However, Clevinger reported a difference in the nature and character of his pain. After the incident occurred on that Friday, he sought care the following Tuesday and never returned to work. Surgery was recommended after the 2019 incident and his symptoms were believed to be significant enough that a referral to a neurosurgeon was made. Those things did not happen after the 2017 incident.

The question of causation is within the purview of the medical professionals. Dr. Nadar opined he felt the current symptoms and the resulting impairment were attributable to the 2019 incident. Dr. Menke did not. He felt the MRIs did not support the conclusion that there had been a structural alteration in the lumbar spine that was new or acutely present after the 2019 incident. That does not explain the symptoms or the fact that they have persisted. Dr. Tutt certainly felt the condition in Clevinger's spine warranted surgery.

Plaintiff argues that pursuant to McNutt, *supra*, that where workrelated trauma causes a dormant degenerative condition to become disabling the trauma is deemed the proximate cause of the harmful change. Dr. Tutt described Clevinger's spine as acutely symptomatic, especially at L4-5.

The arguments by counsel for both parties are well-made and welltaken by the ALJ. Having to choose between the opinions of Dr. Nadar and Dr. Menke is difficult. However, the ALJ finds Dr. Nadar's opinion most consistent with Clevinger's testimony and the fact that his post-2019 incident symptoms left him unable to return to work despite being able to do so on prior

occasions after injuries. In reliance upon Dr. Nadar's causation opinion the ALJ finds Clevinger sustained a permanent injury to the lumbar spine as a result of the August 30, 2019 lifting incident.

Calvary filed a Petition for Reconsideration making the same arguments it makes on appeal. The ALJ overruled the petition, stating as follows,

*verbatim:*

This matter is before the ALJ on Defendant's Petition for Reconsideration. Therein, the Defendant argues the undersigned erred by failing to recognize the Supreme Court of Kentucky's decision in Weatherby v. Amazon.com, 580 S.W.3d 521, 530 (Ky. 2019) and the to be published decision in Viwin Tech Windows & Doors, Inc. v. Ivey, 2019-SC-0370-WC (Ky. Mar. 25, 2021).

The ALJ did refer to Finley v. DBM Technologies, 217 S.W. 3d 261, 265 (Ky.App. 2007) in the Opinion, Award and Order in this claim. Defendant argues the ALJ should have found Clevinger's lumbar spine to be the subject of a pre-existing active condition for which no impairment should have been assigned. It contends the ALJ's reliance upon Dr. Nadar was improper as it was based on Clevinger's subjective complaints and not objective evidence.

Instead, the Defendant argues the ALJ should have relied upon the opinion of Dr. Menke who reviewed both lumbar MRIs (2017 and 2019). Pointedly, the Defendant argues Clevinger had a 2017 injury that required an MRI and treatment. It then argues that based on Wetherby and Viwin, the ALJ erred in finding Clevinger was asymptomatic prior to the injury and that there was no pre-existing active impairment associated with his subsequent injury claim.

The undersigned is familiar with the Court's decisions in Wetherby and Viwin. Wetherby and Viwin were both cases where a surgery occurred prior to the injury. The Guides mandate an impairment rating be assigned for a lumbar surgery. Here, Clevinger had an MRI and

treatment in 2017. Finley still controls this situation insofar as where the ALJ must look to the medical opinion evidence to ascertain whether or not Clevinger's back was actively symptomatic and impairment ratable prior to the alleged work injury. The ALJ found Dr. Nadar persuasive and relied upon Dr. Nadar's opinion in making the award. The argument here is between the expert medical opinion evidence. The ALJ could have relied upon Dr. Menke's analysis but chose not to do so.

Calvary appeals, arguing the ALJ erred in relying solely on Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007) and disregarded the more recent, applicable, and controlling cases of Wetherby v. Amazon, supra, and Viwin Tech Windows & Doors inc v. Ivey, supra. It also argues alternatively that Dr. Nadar's report, on which the ALJ relied, does not constitute substantial evidence.

As the claimant in a workers' compensation proceeding, Clevinger had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Clevinger was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. 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 an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). 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 (Ky. 1977). Although a party may note evidence that would have supported 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). 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).

Calvary argues Dr. Nadar's opinions do not constitute substantial evidence as they were based on subjective complaints and not on objective findings. We disagree. Dr. Nadar examined Clevinger, reviewed medical records (including diagnostic studies) in formulating his opinions, and explained the basis for his opinions. This clearly constitutes substantial evidence which can be relied on by the

ALJ in making his determinations regarding the issues of work relatedness/causation. We affirm in this regard.

Calvary also argues that the ALJ erred in not finding the opinions of Dr. Menke persuasive. Dr. Menke opined Clevinger's current low back problems date back to the 2017 work incident for which he had a 10% prior active impairment rating. It argues the ALJ erred in not applying the holdings of the cases of Wetherby v. Amazon, supra, and Viwin Tech Windows and Doors v. Ivey, supra, to this claim. It argues, per these cases, the ALJ must deem the 10% impairment rating in this case pre-existing active, therefore resulting in Clevinger's claim being dismissed. We disagree.

In Wetherby and Viwin Tech and Doors, the Court held in a situation where the AMA Guides compel the assignment of an impairment rating for a physical condition, in both cases for prior spinal surgery, a pre-existing active impairment rating for the same is compelled, and a finding of whether the claimant was symptomatic from the injury is irrelevant. The ALJ considered both of those decisions, and noted in each case previous surgery was performed, but in this case there was no prior surgery.

The ALJ was confronted with conflicting evidence. Clevinger admitted he sustained a prior low back injury in 2017 for which he received chiropractic treatment and underwent an MRI. According to him, the condition completely resolved without him missing work during the interim. Clevinger supported this position with Dr. Nadar's testimony. Dr. Nadar was familiar with the 2017 incident and the treatment Clevinger received, and he reviewed the one taken

after the August 20, 2019 work incident. Dr. Nadar opined the 2017 incident was only transient in nature and resolved. Dr. Nadar opined all of Clevinger's current low back problems were caused by the August 20, 2019 work incident.

On the other hand, Dr. Menke reviewed the same medical records, the same MRI's both before and after the August 20, 2019 work incident, examined Clevinger, and opined all his problems were pre-existing active and the result of the 2017 work incident.

After carefully reviewing the evidence, the ALJ was persuaded by the testimony of Dr. Nadar and Clevinger. He determined Clevinger met his burden of proving he suffered a low back injury as defined by the Act. This was a proper exercise of discretion by the ALJ and will not be disturbed on appeal. What Calvary is seeking is an opinion from this Board substituting its judgment for that of the ALJ and a determination that Calvary did not meet his burden of proof. This we decline to do.

Accordingly, the Opinion, Award and Order of May 17, 2021 as well as the June 16, 2021 Order on Petition for Reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge are **AFFIRMED**.

ALL CONCUR.

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